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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR APPELLEE RAILWAY EXPRESS AGENCY INCORPORATED

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OPINIONS BELOW

The opinion of the district court (R. 405-416) is reported at 255 F. Supp. 704 (1966). The order of the Interstate Commerce Commission that is in issue appears in the Record at page 304 and the prior related orders of Division 3 of the Commission appear at pages 197 and 289.

JURISDICTION

The judgment of the district court dismissing the complaints was entered on April 11, 1966 (R. 417), and the notice of appeal to this Court was filed on May 3, 1966

(R. 418-429). Probable jurisdiction was noted on October 17, 1966, 87 Sup. Ct. 201. The jurisdiction of this Court rests on 28 U. S. C. § 1253.

QUESTION PRESENTED

Whether the Interstate Commerce Commission properly acted within its discretion in authorizing Railway Express Agency, Inc. (REA) to issue twenty percent of its stock for sale to The Greyhound Corporation (Greyhound) under Sections 20a(2) and 214 of the Interstate Commerce Act, while deferring consideration for sixty days of alleged problems of control of REA by Greyhound or by appellant railroads under Section 5(4) of the Interstate Commerce Act and alleged problems under Section 7 of the Clayton Act because the facts determinative of those issues cannot be known until the end of those sixty days.

STATUTES INVOLVED

The statutes involved, in addition to those set forth in the Appendix to Appellants' Brief, include Sections 5(8), 16(12), 14(1) and 20a(6) of the Interstate Commerce Act, 49 U. S. C. §§ 5(8), 16(12), 14(1), 20a(6), and part of Section 8 and Section 10(e) of the Administrative Procedure Act, 5 U. S. C. §§ 1007, 1009(e) each of which is set forth in Appendix A hereto.

STATEMENT

The proposed transaction under review here requires two steps to complete. Each step involves different parties, different interests and creates different problems. It was fashioned in two steps, instead of one, because of the competing interests of REA, the appellant railroads, who are stockholders of REA, and other REA stockholders (R. 83).

Step one is the issuance and sale by REA of twenty percent of its stock to Greyhound for $10 million, which the Commission has found REA urgently needs (R. 200).

Step two is a tender offer to REA's stockholders for an additional forty percent of REA's stock, which Greyhound must make and complete within sixty days after the initial sale. All of REA's present stockholders have a right of first refusal with respect to any stock tendered to Greyhound. The appellant railroads have made clear their intention to exercise their rights to prevent Greyhound from acquiring one share of stock beyond the initial twenty percent. When the appellant railroads do so they will own nearly fifty percent of REA's stock (R. 40-41, 83, 200).

REA submitted step one to the Commission for approval under Section 20a(2) of the Interstate Commerce Act, 49 U. S. C. § 20a(2) (R. 1). Appellants intervened and urged the Commission to determine immediately the consequences of both transactions under Section 20a(2) or Section 5(4) of the Interstate Commerce Act, 49 U. S. C. § 5(4) (R. 197-98). The United States also initially requested the Commission to institute a proceeding under Section 7 of the Clayton Act, 15 U. S. C. § 18 (R. 75).

The Commission approved step one under Section 20a and deferred consideration of the alleged control and competition problems until the results of the tender offer are known (R. 197-202).

We believe the Commission correctly exercised its discretion. Appellants contend that the Commission had no discretion, but that it was absolutely required to consider and resolve the consequences of both steps before it approved step one. In our view appellants have badly misconstrued the Commission's order and misstated the case and the issues presented. Therefore, a rather extensive statement is required.

The Parties

REA operates throughout the United States and in Puerto Rico and Canada. The Commission has found that "REA holds itself out to transport all commodities, in any form tendered, covered by its tariff publications . . .", *Railway Exp. Agency, Inc., Extension—Nashua, N. H.*, 91 M. C. C. 311, 315 (1962), *sustained sub nom. Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328 (D. Mass. 1963), *aff'd per curiam*, 376 U. S. 514 (1964).

Greyhound owns all of the stock of Greyhound Lines, Inc., a motor carrier of passengers and express (R. 74). It can only transport property on its passenger vehicles and is therefore limited in the size, weight, volume and character of the freight it can handle (R. 353).

The United States is the statutory defendant under 28 U. S. C. § 2322 and the Interstate Commerce Commission has intervened pursuant to 28 U. S. C. § 2323.

Appellants are five railroads, nine motor carriers of property, the national association of motor carriers and one of its conferences, the national association of freight forwarders and seventeen motor carriers of passengers.

The five railroad appellants are The Denver and Rio Grande Western Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; Southern Pacific Company; and St. Louis Southwestern Railway Company and its subsidiary, St. Louis Southwestern Railway Company of Texas, both of which are controlled by Southern Pacific Company, *St. Louis Sw. Ry. Control*, 180 I. C. C. 175, *modified*, 180 I. C. C. 710 (1932). Each railroad is a stockholder of REA and, at the commencement of this proceeding, they owned in the aggregate 211,552 shares of REA stock, or slightly more than ten percent of the stock

now outstanding (R. 41).[1] In the court below these appellants asserted that the Commission's order at issue here would permit diversion of traffic from REA to Greyhound to "the detriment of REA and some or all of its railroad stockholders" (R. 321).

Appellant, the American Trucking Associations, Inc. (ATA), "is the national organization of the trucking industry" (R. 322). Its membership comprises both regulated and non-regulated trucking companies. Appellant, the Regular Common Carrier Conference (the Conference), an affiliate of ATA, is comprised of approximately 1,600 common carriers by motor vehicles under regulation by the Commission (R. 323). Both asserted before the Commission that their members are competitive with both REA and Greyhound (R. 79).

There are also nine appellant individual motor common carriers of general commodities (R. 175-79) who alleged below that they each compete with both REA and Greyhound (R. 332).

Appellant Freight Forwarders Institute (Freight Forwarders) is an association of freight forwarders operating under permits issued by the Commission and subject to the jurisdiction of the Commission under part IV of the Interstate Commerce Act, 49 U. S. C. §§ 1001-22 (R. 329). Before the Commission, Freight Forwarders claimed that since REA "is departing more and more from its traditional role in the general scheme of transportation and is entering the domain of a hauler of general freight in volume lots as distinguished from 'express matter' " (R. 46; footnote omitted), the impact of an REA-Greyhound arrangement "on the forwarding industry would be catastrophic" (R. 45).

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[1]Since the commencement of this proceeding Southern Pacific has acquired through Southern Pacific Land Co., a subsidiary, an additional 23,355 shares.

The 17 appellant motor bus carriers each alleged below that they "are in direct competition" with both Greyhound and REA (R. 347).

REA's Corporate Structure

REA has a unique corporate structure. At the commencement of this proceeding, all of its capital stock was owned by sixty major railroads,[2] each of which has a right of first refusal with respect to all other issued and outstanding stock (R. 40-41, 83). Until recently only a railroad could be a stockholder of REA (R. 6). Under its by-laws, REA's directors are divided into four groups. Three of the groups consist of directors elected by railroad stockholders who operate in the Eastern District, the Western District and the Southern District of the United States (R. 36). The stockholders in those districts are entitled to nominate and elect seven, six and five directors, respectively (*ibid.*; App. B, p. 61).[3]

The structure of REA's Board of Directors cannot be modified, either in terms of the total number of directors, of which there are presently twenty-five, or in terms of the number elected by each group of stockholders, without an affirmative vote of the holders of two-thirds of REA's stock (R. 36; App. B, p. 71). The three railroad groups have named, and will presumably continue to name, to the REA board senior executives of railroads within the respective districts (R. 146-47). Among the directors at

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[2]Some changes in the ownership of REA's stock have since occurred. Its stockholders at present are fifty-eight railroads and one noncarrier subsidiary of a railroad (see n. 1, *supra*).

[3]REA's by-laws were not submitted to the Commission in this proceeding but were incorporated therein by reference to the proceedings before the Commission in Finance Docket No. 22596 (R. 2). Accordingly, for the Court's convenience, REA's By-laws have been printed as Appendix B hereto.

the time of the Commission proceedings were officers of appellants Santa Fe and Southern Pacific (*ibid.*).

The fourth group of directors consists of seven directors at large, including two present vacancies (R. 29). After consummation of the proposed sale of 500,000 shares of stock to Greyhound, it will be entitled to name five of those directors (R. 15). Even if Greyhound purchased an additional 1 million shares of REA stock, through the tender offer described hereafter, and thus owned approximately sixty percent of REA's stock, Greyhound would nevertheless, under by-laws which it could not change, be able to name only five of the twenty-five directors; the railroads in the three districts would continue to name eighteen directors (R. 36).

The members of REA's Board are principally representatives of their railroad employers, from whom REA still purchases two-thirds of its transportation requirements, 80 ICC ANN. REP. 20 (1966). Plainly neither they nor REA management would be subject or responsive to the usual influence exerted by a major stockholder.

REA's Efforts To Become Independent And Its Financial Needs

From its organization in 1929, see *Securities and Acquisition of Control of Railway Exp. Agency, Inc.*, 150 I. C. C. 423 (1929), until its recent reorganization, REA was operated as an entirely closed, nonprofit service organization. Under a pooling agreement approved by the Commission (*ibid.*), the railroads provided REA with transportation services and shared any profits or loss realized from its operations.

In 1959, REA was pushed to the brink of liquidation by the threatened withdrawal of a large eastern railroad

from the pooling agreement, *Express Contract, 1959,* 308 I. C. C. 545, 546 (1959). There were indications that if that threat were carried out, other eastern carriers would follow the example, which would result in the dissolution of REA, *ibid.* The threatened withdrawals reflected the mounting deficits incurred by railroads from express operations, *ibid.* In order to avoid liquidation of REA, a new agreement was devised by REA and assented to by all but one of the express carrying railroads.[4]

That agreement, which was approved by the Commission, *id.* at 551, resulted in two basic changes in REA's status. First, it set in motion a procedure whereby, on July 1, 1961, REA was placed on a normal profit and loss basis in order to provide the incentive for a more efficient and economic operation, *id.* at 549-50. Second, the agreement eliminated the restrictions on REA's utilization of carriers other than railroads and imposed upon it the obligation "to conduct the express transportation business efficiently and economically using such routes and modes of transportation as in the judgment of the Express Agency shall be most advantageous in achieving such objective", *id.* at 547. Thus, the 1959 contract started REA on the way toward some measure of independence of the railroads, *cf.* 80 ICC ANN. REP. 22 (1966).

In 1963, the corporate structure of REA was further modified, with the approval of the Commission, *Railway Express Agency, Inc., Stock,* Finance Docket No. 22349, to make it possible to raise much needed equity capital and thus to achieve a measure of economic viability and independence. The provision in its by-laws that only railroads could be stockholders was eliminated, thereby for the first time opening the possibility of a broader base of stock

[4] This is the agreement by which REA's operations are now governed (R. 34).

ownership (R. 6).[5] To facilitate that purpose the 1,000 outstanding shares of REA stock were reclassified into 2,076,000. However, all of those shares are subject to a right of first refusal on the part of each of REA's then current stockholders (R. 83).[6] At the same time, 500,000 additional shares were authorized but not issued (R. 6). Unlike the issued shares, sale of that block of stock is not restricted by the right of first refusal (R. 83). However, those shares may be issued only with the consent of the holders of two-thirds of REA's outstanding stock (R. 27).

The change from a service organization to an independent operator produced an immediate need for terminal and operating equipment acquisitions (R. 34). Because of its historical method of operation, REA's retained earnings do not provide sufficient funds to permit it to complete these essential but long deferred capital acquisitions—acquisitions which are crucial to its ability to continue to compete effectively (R. 6, 34). Thus, for the six-month period ending June 30, 1964, on revenues of $200 million, REA had net income of less than $1 million, or one half of one percent of revenues (R. 12). As of that date, it had long-term debt outstanding of over $60 million[7] against an equity (common stock at par value plus corporate surplus) of $10.5 million, or a debt-equity ratio of nearly six to one (R. 11). Moreover, the completion by REA of the terminal

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[5]One of the purposes of the proposed transaction, as set forth in REA's application to the Commission, is "broadening the ownership of [REA's] capital stock" (R. 5).

[6]This information was, of course, known to the Commission, which had approved the stock split in Finance Docket No. 22349. It was therefore unnecessary for REA to describe it in its application and such earlier proceeding was merely referred to (R. 6).

[7]Composed of (R. 11),

Advances from stockholders	$27,637,054
Notes payable	8,468,000
Equipment obligations	24,281,743
Total	$60,386,797

improvement and equipment acquisition program, which it was forced to launch by the change in its relationship with the railroads, requires an expenditure of almost $40 million (R. 6, 13-14). Clearly, REA must obtain outside debt financing. In order to do so, it must increase its equity base and thereby reduce its debt-equity ratio sufficiently to make it attractive to lenders (R. 6).

The Proposed Transactions between Greyhound, REA and REA's Stockholders

In 1964, Greyhound provided the opportunity for REA to obtain the needed equity. At first, Greyhound proposed to acquire a controlling block of the outstanding stock (R. 82). That offer was directed to REA's shareholders and contemplated Greyhound's purchase from them of at least sixty-seven percent of the outstanding stock (R. 99-100). Greyhound intended to retain at least fifty-one percent and to make sixteen percent of the stock available for purchase by the major airlines (R. 94). Greyhound agreed that, if it was successful in acquiring the requisite shares, it would "finance its pro rata share of the capital requirements of REA" (R. 96). That offer stipulated that the "final transaction must be approved by the Interstate Commerce Commission" (R. 100). However, that approach, and submission to the Commission of a proposed final transaction, was successfully blocked by certain REA stockholders including appellant railroads, who made clear their intention to exercise their right of first refusal with respect to all issued stock (R. 83).

Because of the opposition of appellant railroads, the parties then turned to consideration of the type of transaction proposed here. REA could sell the 500,000 shares of unissued stock with the consent of two-thirds of its stockholders and without triggering a right of first refusal with

respect to those shares (R. 83). The cash REA would obtain by selling those shares would enable REA to make necessary capital expenditures (*ibid.*). However, the sale of the unissued stock alone, which also would have been a final transaction, was not satisfactory to some of REA's stockholders who wished to sell their stock (*ibid.*). Those stockholders insisted that Greyhound also make an offer to the REA stockholders to purchase at least part of the issued stock (*ibid.*). That offer would, of course, trigger the right of first refusal with respect to the issued stock, but the stockholders who desired to sell would have a buyer, either in Greyhound or in one of the appellant railroads (*ibid.*).[8]

Hence the present two-step proposal was evolved, and approved by REA's stockholders in October 1964 (R. 84). Greyhound will purchase at $20 per share the 500,000 unissued shares which are not subject to the right of first refusal (R. 84, 115-116). REA will thus receive $10 million. Immediately following the consummation of that sale, Greyhound must make a tender offer to REA's stockholders, good for sixty days, to purchase 1 million of the presently outstanding shares at the same price of $20 per share (R. 84, 116). That offer, which was included in the proposal at the request of REA stockholders (R.

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[8]Significantly, Greyhound's proposal to purchase the 500,000 shares of unissued stock from REA at $16 per share and to make a tender offer to REA's stockholders for 749,594 shares (which together would give Greyhound fifty percent of REA's outstanding stock, R. 111, was rejected by REA because

> ". . . certain of the REA stockholders expressed an intention to prevent Greyhound from acquiring any shares in addition to the 500,000 shares to be acquired from REA and insisted that it was unfair to require them to pay $25 a share on the exercise of their right of first refusal when Greyhound was purchasing shares from REA at about the same time at $16 a share." (R. 84)

83), will create a market for any stockholders who may wish to sell their holdings.

There are at least three logically possible responses to that offer:

(1) All of REA's stockholders may reject Greyhound's tender offer. That result is highly unlikely since the holders of at least 900,000 shares have already announced their intention to sell (R. 113). However, in that unlikely event, Greyhound would remain the owner of 500,000 shares, or twenty percent, of REA's stock.

(2) Up to 1 million shares of REA stock may be tendered to Greyhound and all of REA's stockholders may decline to exercise their rights of first refusal with respect to some of or all such shares. Again, that result also seems most improbable since the appellant railroads have already made clear their intention to exercise their rights of first refusal (R. 200). However, if the appellants should later change their position and no other railroad exercised its right of first refusal, Greyhound would then become the owner of between one and 1 million additional shares of REA stock.

(3) Up to 1 million shares of REA stock may be tendered to Greyhound, but one or more of REA's own shareholders may exercise their right of first refusal with respect to such shares. Greyhound would then remain the owner of 500,000 shares, but the shareholdings of one or more of REA's present stockholders would be greatly increased.

The history of negotiations between Greyhound and REA, and the position taken by the railroad appellants, strongly indicate that the third possibility is the most prob-

able. Greyhound was told by appellant railroads "that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders" (R. 200). If the third possibility does occur, although Greyhound's stockholdings would be unchanged, the position of Greyhound and the railroad appellants, or other railroad stockholders, with respect to REA will be substantially different than after the sale of the 500,000 shares to Greyhound.

The present proposal also allows Greyhound to name five of REA's twenty-five directors (R. 151). Because of the By-law restrictions described above, which may not be changed without an affirmative vote of two-thirds of the stockholders (*supra*, p. 6), Greyhound would not have the right to name more than five directors even if it obtained sixty percent of REA's stock (R. 36, 90-91).

In addition the proposal provides that the REA Board shall

> ". . . adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage" (R. 15).

In that connection, appellants have placed great weight upon a "Memorandum of Understanding" between an officer of REA and an officer of Greyhound (R. 149), characterizing it as a "blueprint for the elimination of competition", Appellants' Brief, p. 13.[9] The memorandum, which

[9]Appellants find it necessary persistently to distort the language of that memorandum. In their purported summarization of it, Appellants' Brief, p. 13 n. 7, appellants twist its meaning as they did in the Jurisdictional Statement, p. 7 n. 8, by, for example, substituting the

was based on a two and one-half day conference (R. 89), sets forth only the potential benefits which might be realized if certain activities of REA and Greyhound were consolidated. It was prepared at a time when the proposal under consideration was the acquisition of at least fifty-one percent of REA's stock by Greyhound and provides that its conclusions are dependent to some degree on the percentage of REA's stock owned by Greyhound (R. 89, 149). The feasibility and practicability of such consolidations have never been explored (R. 89).[10] Under the terms of the proposal, REA is not committed to consolidate any part of its operations; it is committed only to consider "seriously" the merits of any lawful and feasible plans which may subsequently be developed (R. 15). As the district court found, the proposal "commits REA only to serious consideration. The effect will depend upon the outcome of the offer to purchase the 1,000,000 shares and the subsequent actions of the REA Board" (R. 413).

Proceedings Before the Commission

(a) REA's Application Under Section 20a

On October 7, 1964, REA filed with the Commission an application for authority, pursuant to Sections 20a and

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verb "would" where the memorandum simply says "could". Thus, the memorandum suggests that Greyhound "could absorb" service and maintenance work on REA equipment in certain locations (R. 151); appellants' "summarization" states that Greyhound "would take over" such work (n. 7 ¶ 2). The memorandum indicates that Greyhound's solicitation force "could be eliminated" and the service performed by REA (R. 152); appellants "summarize" that statement by asserting that the two companies "would use" the same forces (n. 7, ¶ 4). Similarly, the memorandum suggests only what could happen "if REA would perform the terminal services other than loading and unloading of buses . . ." (R. 150; emphasis added); appellants' quotation of that statement carefully omits the "if" (n. 7 ¶ 1).

[10] Indeed, the memorandum itself states that time limitations made necessary field studies impossible (R. 149).

214 of the Interstate Commerce Act, 49 U. S. C. §§ 20a, 314,[11] to issue the 500,000 authorized but unissued shares to be sold to Greyhound. In that application, REA described at length the terms upon which it proposed to sell those shares to Greyhound (R. 1-9). It attached copies of its current balance sheet and income statement, the agreement with Greyhound and the relevant Board resolutions and minutes of the stockholders' meeting (R. 11-31). REA stated that the primary purpose to which the proceeds of the issue would be devoted was the improvement of its debt-equity ratio to make possible needed financing and improvements (R. 5).

On October 20, 1964, pursuant to its duty to investigate under Section 20a(2), 49 U. S. C. § 20a(2), the Commission forwarded an Information Request to REA, seeking detailed information as to the negotiations and proposed sale to Greyhound and the effect of the transaction on REA. The information requested was furnished to the Commission by REA on November 16, 1964 (R. 82-158).

The facts which REA furnished to the Commission included all of the information regarding the negotiations with Greyhound set forth above. Those facts were not disputed before the Commission or the court below. That lack of controversy is particularly significant because two of the appellants here—Southern Pacific and Santa Fe—had representatives on the board of REA during the course of negotiations with Greyhound. Those representatives were not only privy to all of the transactions involved but were actively engaged in blocking Greyhound (R. 108). Indeed, the blocking position adopted

[11] Section 214 makes Section 20a applicable to regulated motor carriers, with certain exceptions not material here. For convenience we shall hereafter refer to Section 20a only.

by those two appellants through the threat to exercise their rights of first refusal was the major factor governing the form of transaction ultimately evolved (R. 83). They have never contended otherwise.

(b) Positions of the Other Parties Below With Respect to REA's Application.

Appellants filed petitions to intervene before the Commission in opposition to REA's application. Each of them, except the stockholder railroads, contended that they competed with REA and Greyhound (*supra,* pp. 4-6). The essence of all the opposing petitions was that the proposed stock issue and the further possible transactions would give Greyhound control of REA in violation of Section 5 of the Act and that such control would in unspecified ways, result in harm to the intervenors (R. 43, 49, 51, 59, 62, 66, 69, 80, 174). All parties requested the Commission to hold hearings on REA's Application either under Section 20a or in a separate proceeding under Section 5 (R. 47, 49, 52, 59, 62, 64, 67, 70, 72, 81, 174).

The Department of Justice also filed a petition to intervene (R. 75). Only the Department raised an issue under Section 7 of the Clayton Act. It requested the Commission to initiate a proceeding under Section 11 of the Clayton Act, 15 U. S. C. § 21, to determine "to what extent, if any, the proposed transaction would result in effects which section 7 of the Clayton Act is intended to prevent" (R. 77).

(c) REA's Response to Those Positions.

In its reply to the petitions in opposition (R. 159), REA urged that questions of control were premature and extraneous to the matter before the Commission (R. 168) and that the petitioners would "have ample opportunity to participate in an appropriate proceeding under Section 5" (R.

164). In that connection, Greyhound filed a letter with the Commission, in which it stated that "if in the future it should appear that there is any possibility of such control by Greyhound, Greyhound will file the necessary Section 5 application."[12]

REA also urged that the issues presented by the Department of Justice relating to Section 7 of the Clayton Act be taken up "at the proper time and in logical order of sequence" (R. 167; emphasis omitted).

As to the hearings requested under Section 20a by all opposing petitioners, REA pointed out that a hearing was not required or necessary, that all information in the possession of REA relating to the proceeding before the Commission had been submitted to the Commission and that a hearing could not develop any additional pertinent information (R. 169).

(d) Attempts by Appellants To Instigate a Proceeding Under Section 5 of the Interstate Commerce Act.

Before the Commission, some of the appellants were quite convinced that REA's Section 20a application was not the proper vehicle for consideration of any alleged control issues.

Thus Transcontinental Bus System, Inc., *et al.*, filed a petition asking that REA and Greyhound "be required to . . . file . . . an application under Section 5" because "the issues pertinent under Sections 20a and 214 are limited and narrow" and

> ". . . unlike Sections 20a and 214, Section 5 does allow, and in fact makes specific provision for, the

[12]This statement was made by Greyhound in a letter to the Commission which was part of the record before the Commission and the district court, but was inadvertently omitted from the Notice of Appeal to this Court (R. 418). Accordingly, it is set forth as Appendix C hereto.

presentation of the issues necessary for a determination of the question as to whether or not Greyhound should be allow to consolidate its facilities and operations with those of R. E. A." (R. 66-67).

In addition, Southern Pacific filed with the Commission a complaint against Greyhound and REA under Section 5(7) of the Interstate Commerce Act, 49 U. S. C. § 5(7), seeking an investigation by the Commission of the alleged control of REA by Greyhound (R. 180).

In their answers to Southern Pacific's complaint, REA and Greyhound stated that they were competitors only for the business of shipping small packages of such size, weight, volume and character that they could be transported on passenger vehicles. Of this business, Greyhound handles substantially less than one percent and REA handles approximately two percent of the United States total, the remaining ninety-seven percent being handled by freight forwarders, truckers, railroads and the United States Post Office (R. 186,191).

It should be made clear that, contrary to appellants' assertion, no party ever suggested to the Commission, explicitly or "in substance", "that express transportation was the relevant market", Appellants' Brief, p. 32.

(e) The Commission's Order.

The Commission found that an investigation of the alleged violations of Sections 5 and 7 "would not be appropriate at this time" (R. 198), that a hearing was not necessary in connection with the requested authority to issue stock (*ibid.*), and that nothing contained in its order should be construed "as creating a presumption as to the action which may be taken on any . . . application under section 5" (R. 201). It then dismissed the Southern Pacific complaint

and granted REA authority under Section 20a(2) to issue not exceeding 500,000 shares of common stock to a non-railroad corporation at a price not less than $20 per share (R. 202).[13]

Several of the petitioners filed petitions for rehearing (R. 214, 223, 228, 238, 244, 257, 259). The Department of Justice, the only party requesting a proceeding under Section 7 of the Clayton Act, having apparently acquiesced in the Commission's determination that findings under Section 7 "would not be appropriate at this time", did not file a petition for rehearing, did not contest the Commission's Order in the court below, and has urged its affirmance in this Court.

Proceedings in the District Court

On June 16, 1965, appellant railroads instituted this action in the United States District Court for the District of Colorado, seeking to enjoin and set aside the Commission's order (R. 308). The gravamen of the complaint was that the Commission had abused its discretion in dismissing Southern Pacific's complaint alleging that the proposed transaction would violate Section 5(4) of the Interstate Commerce Act; that the Commission's denial of a hearing was a violation of due process of law; and that the Commission's findings were deficient because made

[13]The Commission's initial order on the merits, to which we have referred above, was entered by Division 3 on March 15, 1965, and is the order in which the Commission set forth its findings and the reasons for its disposition of this proceeding (R. 197). Thereafter, the Commission, by Division 3 acting as an Appellate Division (see 49 C. F. R. § 1.101(a)(3)), entered an order dated May 28, 1965, in which it denied petitions for reconsideration filed by several petitioners after finding that they made "no showing . . . warranting reconsideration" (R. 290). The full Commission, by order dated August 11, 1965, recalled the proceedings from Division 3, vacated the order of Appellate Division 3 dated May 28, 1965, reopened the proceedings for reconsideration and upon reconsideration affirmed the "action taken by Division 3 in its order dated March 15, 1965" (R. 304-05).

without the benefit of evidence in opposition to REA's application (R. 315-16). There was no allegation in the complaint that the proposed acquisition would violate Section 7 of the Clayton Act.

Thereafter, the nonrailroad appellants intervened. Appellant Freight Forwarders alleged in its complaint that "intervening plaintiff's members are in direct competition with Railway Express Agency (REA) and with Greyhound Corporation in the movement of package freight between points in the continental United States" (R. 329). It then adopted by reference the pertinent paragraphs of the railroad plaintiffs' complaint "adding that freight forwarders in the ordinary conduct of their business compete directly with both REA and Greyhound" and that the market in which REA and Greyhound compete is the transportation of "less-than-carload (package) freight" (R. 330).

Appellant bus lines similarly adopted by reference the pertinent paragraphs from the complaint filed by the railroad plaintiffs and made no reference to Section 7 (R. 347-48), even though appellants now contend that appellant bus lines are the only parties who compete with REA and Greyhound, Appellants' Brief, p. 34.

Appellant truck lines did raise, *inter alia*, the Section 7 issue in their complaint (R. 337-38). They also alleged that

> "Each of said plaintiffs competes over one or more of its authorized routes with Railway Express Agency, Incorporated . . . and with Greyhound Corporation . . . or corporations controlled by it, in the transportation of property for hire" (R. 332).

Appellants ATA and the conference also alleged, among other things, that the Commission erred in deferring consideration of alleged issues under Section 7 (R. 327).

On April 11, 1966, the district court handed down its decision, refusing to enjoin and set aside the order of the Commission and dismissing the complaints (R. 405).

SUMMARY OF ARGUMENT

1. Appellants' basic position is predicated upon the assumption that the Commission improperly either ignored or approved, deliberately or inadvertently, the alleged unlawful control of REA by Greyhound and the effects upon competition allegedly arising out of that relationship, without giving adequate consideration to those issues. That position is in turn founded upon an unsound, forced construction of the Commission's order. The Commission made perfectly clear that it neither ignored nor approved the alleged unlawful conduct but instead held that investigation into those issues "would not be appropriate at this time" (R. 198). The Commission expressly stated, in terms which could hardly be more explicit, that nothing in its order should be construed "as a determination of any matter under any section of the act, except sections 20a and 214" (R. 201). Moreover, the Commission made it quite clear that appellants would have ample opportunity to participate in resolving the questions relating to the alleged problems of control and competition at the appropriate time (R. 201).

2. Even if it is assumed, and we do so assume *arguendo* on this appeal, that appellants' allegations before the Commission raised a serious question of control under Section 5 of the Interstate Commerce Act or of competitive effect under Section 7 of the Clayton Act, the Commission's decision was the most reasonable one available under the facts presented here. REA applied for author-

ity under Section 20a of the Interstate Commerce Act to issue 500,000 shares (or twenty percent) of REA's stock to be sold to Greyhound for $10 million, which REA demonstrated, and the Commission found, REA urgently needed (R. 200). That sale is the first step in a two-step transaction, devised to cope with the conflicting interest of REA, the appellant railroads and REA's other railroad stockholders. The second step requires Greyhound to make a tender offer to REA's stockholders for an additional 1 million shares (or forty percent) of REA's stock. That offer will trigger the right of first refusal on the part of REA's present stockholders, which the appellant railroads have stated they will exercise (R. 200). That tender offer will expire sixty days after the sale of the initial 500,000 shares to Greyhound. The most likely result of that tender offer, although not the only one possible, is that appellant railroads will end up with about fifty percent of REA's stock while Greyhound has twenty percent.

Three alternatives were available to the Commission. It could have instituted lengthy hearings under Section 5 of the Interstate Commerce Act and/or Section 7 of the Clayton Act, to determine whether the ownership by Greyhound of twenty percent of REA's stock for sixty days was in the public interest. Secondly, appellants now suggest for the first time that the Commission could have adopted appellants' allegations and dismissed REA's application without any proceeding of any sort. That would require REA to try to renegotiate an agreement which was almost a year in gestation and to give the appellant railroad stockholders another opportunity to prevent REA from achieving further independence of the railroads. Failure in that attempt would deprive REA of the urgently needed funds; even success would delay unreasonably REA's receipt of those

funds. The Commission followed the third alternative: it approved the 20a application and reserved consideration of the problems raised by whatever the final result of the tender offer may be until the facts are known.

3. Appellants concede "that the primary concern of the Congress in enacting Section 20a(2) was to equip the Commission with authority to prevent fiscal manipulation", Appellants' Brief, p. 37. Appellants argue, then, that a collateral purpose of that section was to require the Commission to enforce Section 5 and Section 7. That contention is rebutted by the legislative history of the Interstate Commerce Act, appellants' own contentions below, the statutory pattern, and prior judicial and administrative interpretations. We show that there is no reason at all to stretch 20a completely out of shape to accommodate the problems with which Section 5 and Section 7 are concerned.

4. The Commission acted well within its discretion in deciding to approve REA's application to issue securities under Section 20a and to postpone consideration of the alleged control and competition issues until the facts ultimately dispositive of those issues become known. In so doing, the Commission did not avoid its responsibility to enforce Section 5 and Section 7. In some circumstances, it may be appropriate for an administrative body to coordinate enforcement of different statutes by disposing of related matters concurrently; it is equally permissible for it to dispose of them seriatim.

5. Our last point shows that the district court correctly found that "the main thrust of plaintiffs' arguments is that the Commission should not have approved the stock issuance without a hearing" (R. 411) and properly disposed of that argument.

ARGUMENT

THE COMMISSION'S ORDER IS CLEAR AND UNAMBIGUOUS

Near the end of their argument appellants contend that "the Commission's Order is not subject to any decently certain interpretation", Appellants' Brief, p. 55. Of more importance, the entire predicate of appellants' position is a continuing misconstruction of the Commission's Order. The thrust of appellants' argument is that the Commission improperly either ignored or approved, deliberately or inadvertently, the alleged unlawful control of REA by Greyhound and the competitive harm said to flow from that relationship. Appellants then concentrate upon the impropriety of that action. It is therefore vital at the outset of our argument not only to dispose of appellants' contention that the Order is ambiguous, but also to make clear that the Commission did not either ignore or approve the alleged unlawful conduct. It follows then that appellants' arguments of impropriety are beside the point.

Preliminarily, appellants seem to be confused as to the sequence of the Commission's orders. They seem to suggest that the first order of Division 3 on the merits, setting forth the reasons for the Commission's decision, was vacated by the full Commission and to imply that no order is outstanding which explains the Commission's action:

> "The order under review, it should be recalled is not the order of Division 3, but the final order of the full Commission which vacated Division 3's order, reopened the case for reconsideration, and then simply stated that 'the action taken by Division 3 in its order dated March 15, 1965, be, and it is hereby, affirmed' (R. 304)" Appellants' Brief, p. 55.

That statement obfuscates what the Commission did. Division 3's order of March 15, 1965, which explains fully the Commission's action, was affirmed by the full Commission in its final order of August 11, 1965; the order vacated was the order of Appellate Division 3, dated May 28, 1965, denying petitions for reconsideration. See n. 13, *supra*. Thus, the Commission order of August 11 vacated the order of Appellate Division 3 denying reconsideration of the order of March 15, granted the petitions for reconsideration, reconsidered and affirmed Division 3's order of March 15.

Appellants are also under a misapprehension as to the statutory standards by which review of the Commission's order is governed. Their contention that the Commission's order is invalid under Section 8(b) of the Administrative Procedure Act, 5 U. S. C. § 1007(b), is based upon a simple failure by appellants to read that statute in its entirety. Appellants state that Section 8(b) "requires the Commission to include in its decisions 'a statement of . . . findings and conclusions, as well as the reasons or basis therefore [*sic*], upon the material issues of fact, law, or discretion presented on the record . . .' ", Appellants' Brief, p. 55. The simple answer to that contention is that Section 8(b) is not applicable to a Commission decision under Section 20a of the Interstate Commerce Act, as in fact appellants elsewhere inadvertently concede. In relying upon Section 8(b), appellants have overlooked the first part of Section 8, which states that "in cases in which a hearing is required to be conducted in conformity with Section 1006 of this title", the provisions cited by appellants apply, 5 U. S. C. § 1007. Thus, Section 8(b) does not apply to a proceeding under Section 20a because a hearing is not required under 20a. Section 20a(6) states "the Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority." Appellants concede that "it was

indisputably within the Commission's discretion to pass upon the fiscal aspects [the 20a application] of the REA proposal without a hearing", Appellants' Brief, p. 57. That concession is certainly well founded in view of the decisions by this Court and the district court in the *Allegheny-Breswick* litigation. *Allegheny Corp.* v. *Breswick & Co.*, 353 U. S. 151, 175 (1957); *Breswick & Co.* v. *United States*, 156 F. Supp. 227, 230 (S. D. N. Y. 1957). [14]

The governing statute in this connection is Section 14(1) of the Interstate Commerce Act, 49 U. S. C. § 14(1) which provides that when the Commission makes an investigation, as it did in this proceeding, see pp. 15-16, *supra*, it shall "make a report in writing"; in which it "shall state [its] conclusions . . . together with its decision, order, or requirement in the premises". Section 14(1) requires finding of fact only in reparation cases. As we demonstrate below, the Commission's order of March 15 far exceeded the minimal requirements of that statute, *Alabama G. S. R. R.* v. *United States*, 340 U. S. 216, 227-28 (1951)

Appellants also seek to generate some preliminary confusion by suggesting that the full Commission in affirming the Order of Division 3 of March 15, 1965, created some unspecified ambiguity because "the Commission set forth no reasoning of its own", Appellants' Brief, p. 55. The effect of the full Commission's Order of August 11, 1965, affirming the Division 3 order, is simply to state that all 11 Commissioners—rather than the three Commissioners who sat on Division 3—agree that the action taken in the Order of Division 3 of March 15 is correct. Surely nothing could be less ambiguous than an affirmance without opinion. That argument is sophistry.

The core of appellants' argument of ambiguity—indeed of appellants' entire position—is that the Order of Division

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[14] That decision by the district court was not the end of the *Allegheny-Breswick* litigation, which we discuss more fully below.

3 of March 15, 1965, sanctioned what they see as probable violations of Section 5 of the Interstate Commerce Act and Section 7 of the Clayton Act either by ignoring those alleged violations or by masking approval thereof under the guise of an order under Section 20a, Appellants' Brief, pp. 3-4, 24-25.

The district court sharply disagreed, holding that the Commission did "not shut its eyes to the competitive effects" and the "Commission did not decide, and we do not decide, any questions relating to control or competition. They are for the future" (R. 415, 416). It is clear that the district court's conclusion is correct.

The first five paragraphs of the order of March 15 simply describe the pleadings and the positions of the parties (R. 197-98). The sixth paragraph announces three conclusions: (1) that the filing of a Section 5 application is permissive and may not be required (no one now suggests the contrary); (2) that a hearing is not necessary for a determination of a 20a application (which appellants now concede, Appellants' Brief, p. 57); and (3) that an investigation of whether the proposed transaction or further prospective agreements between REA and Greyhound might violate Section 5 of the Interstate Commerce Act or Section 7 of the Clayton Act "would not be appropriate at this time" (R. 198).

Paragraphs 7 through 10 of the Commission's order recite quite clearly why such investigations would not be appropriate at this time. That recitation is entirely in terms of the undisputed facts of record with respect to REA's stockholders' right of first refusal, the REA-Greyhound negotiations and agreement, including the tender offer, the composition of the REA board, and finally, in the tenth paragraph, the urgent need of REA for new equity capital (R. 198-200).

Paragraph 11 of the order describes the principal objection urged by the intervenors in opposition, namely, the possibility of control and the combination of certain facilities and services (R. 200).

Paragraph 12 then deals with the imminence of those possibilities in terms of the undisputed facts as to the position taken by appellant railroads regarding the right of first refusal, the composition and caliber of the REA Board of Directors which "under the by-laws, as amended, would not permit Greyhound to control the board" and then points out that "control or the power to control must be real and not based on conjecture or remote possibilities . . ." (R. 200-201). Appellants have subjected that paragraph to much abuse in an attempt to read into it a finding by the Commission with respect to control under Section 5 of the Act. We believe there is no such finding in that paragraph. The Commission obviously was simply reciting the reasons why it was appropriate to reserve the question of control until after the tender offer.

That reservation is made crystal clear in paragraph 13 where the Commission points out that Greyhound has acknowledged the requirements of Section 5 if "control or power to control . . . becomes imminent or apparent" and that there will be opportunity later for all parties "to interpose their opposition" to such control (R. 201). Then the Commission expressly and carefully states

> " . . . that nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214, as expressly determined herein, or as creating a presumption as to the action which may be taken on any such application under section 5 . . ." (*ibid.*).

That ultimate conclusion leaves no doubt whatever of the scope of the Commission's Order.

The fourteenth paragraph is the ultimate statutory finding and the rest of the order contains the ordering paragraphs (R. 201-02).

The district court properly concluded,

> "The Commission decided that it was not appropriate to resolve control and competition questions at this time and that the § 20a(2) standards for approval of stock issuance had been met. In our opinion the Commission order is clear and understandable and presents an adequate basis for judicial review." (R. 416)

Thus, the narrow question to be decided is whether the Commission properly exercised its discretion in authorizing REA's Section 20a application before it considered the control and competition questions under Section 5 of the Interstate Commerce Act and/or Section 7 of the Clayton Act.

II. The Commission's Decision Was the Most Reasonable One It Could Have Made Under All the Circumstances

It is not necessary to convince this Court that the Commission's decision was the best way to handle the problems presented to it. To uphold the Commission's decision we need only show that it was a reasonable exercise of discretion within the limits of the Commission's statutory authority. Administrative Procedure Act, § 10(e), 5 U. S. C. § 1009(e); *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 536 (1946); *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125 (1939). However, it is useful to appraise first the desirability—almost inevitability—of the Commission's choice in terms of the available alternatives and the facts presented to the Commission. Then, in the following

sections we demonstrate that the Commission's disposition of this matter was well within the permissible limits of discretion.

The undisputed facts presented by REA in connection with its 20a application showed that the purchase by Greyhound of 500,000 shares of REA's stock was only the first step of the contemplated transaction (*supra,* pp. 11-13). The pending second step—the tender offer to be completed almost immediately after the acquistion of stock by Greyhound—made clear that the future control of REA was in considerable doubt. The consequences of the tender offer could be that Greyhound would end up with sixty percent of REA's stock, that Greyhound would have twenty percent of REA's stock and the appellant railroads almost fifty percent, or any one of an almost infinite number of other possibilities in between those two (*supra,* p. 12). The proposed two-step transaction arose in unique circumstances. The REA by-laws secured to the railroad stockholders the continuing right to select eighteen of REA's twenty-five directors. Those by-law provisions could not be changed by Greyhound even if it obtained sixty percent of the stock of REA (*supra,* p. 13). REA's directors are representatives of their own companies rather than simply directors in the ordinary sense (*supra,* p. 7).

Moreover, it was clear that the transaction had been framed in two steps because of the position of appellant railroads, who insisted that they would exercise their right of first refusal to prevent Greyhound from obtaining any of REA's issued stock, and demands of other stockholders that a market be created through the tender offer which would enable them to sell their stock either to the appellant railroads or to Greyhound (*supra,* pp. 10-11).

Finally, the Commission was convinced that REA urgently needed the $10 million which the sale of the unissued 500,000 shares of stock to Greyhound would produce (*supra*, pp. 9-10; R. 200). All of those circumstances were undisputed by any party.

On the other hand, the Commission had to consider the allegations made by appellants in their pleadings before the Commission. Those allegations were quite different there than appellants have cast them here, particularly with regard to the alleged Section 7 problem. No party, except the Department of Justice, raised any Section 7 argument before the Commission prior to the decision of Division 3 (R. 198; *supra*, p. 16).[15] Before the Commission all of the appellants claimed that they competed with REA and Greyhound and focused their attention entirely upon the possibility of control of REA by Greyround (*supra*, p. 16).

Here appellants have ignored many of their earlier allegations and have conjured up what they now contend is an appropriate "line of commerce" for measuring the alleged anti-competitive effect. That line of commerce is designated "express", Appellants' Brief, p. 32. Appellants' entirely erroneous position is based upon ancient and specifically overruled case law and a statistical analysis which cries out for repudiation. It is fallacious in the extreme, and in Appendix D hereto we demonstrate that it is not worth serious attention. Although a good deal of appellants' argument is colored by their market analysis, we do not believe that evaluation of their position, a position neither suggested to or passed upon by the Commission, is central to

[15] The only party, other than the Department of Justice, which even mentioned Section 7 to the Commission was ATA, in its petition for reconsideration. Moreover, even ATA judged the alleged Section 7 problems of sufficient triviality to merit only an oblique allusion in the body of the petition (R. 264) and citation of the statute in the prayer (R. 267).

any proper consideration of the Commission's Order. Thus, for purposes of our argument, we assume that appellants' pleadings before the Commission presented what they did not, namely, a serious question under Section 5 of the Interstate Commerce Act and/or Section 7 of the Clayton Act. We do concede that at least some question was raised before the Commission under those statutes. We accept the broader assumption *arguendo* to demonstrate that even if appellants could prove what they allege for the first time in their briefs on appeal, the Commission's decision is still correct.

With the uncontroverted facts submitted by REA and the allegations of appellants before it, the Commission had three alternatives. First, it could have ordered hearings to be held under either Section 5 of the Interstate Commerce Act or Section 7 of the Clayton Act. As appellants concede, it is not unreasonable to suggest that those proceedings would have taken at least two or three years, Jurisdictional Statement, p. 20. In the meantime, REA would have been without the money which the Commission found it urgently needed (R. 200). In addition, as the district court found, such a proceeding would have been "an exercise in futility" (R. 416). That is clearly so because the only issue which the Commission could have determined would have been whether it was a violation of Section 7 or in the public interest under Section 5 for Greyhound to own twenty percent of REA's stock under the circumstances in existence for the sixty days during which the tender offer would be pending. Obviously, the hearings would then have had to be repeated almost in their entirety after the tender offer had made clear the resulting holdings of REA stock by the railroads and Greyhound.

The second alternative which appellants suggest in their brief, but did not suggest to the Commission, is that the

Commission "could readily have denied section 20a(2) approval unless the parties reformed their contract so that the offer would expire prior to the Commission's section 20a(2) determination", Appellants' Brief, p. 49. In other words, the Commission could have adopted appellants' allegations and dismissed REA's application without any proceeding of any sort. This new suggestion would require REA to seek once again an acceptable resolution of the conflicting interests of its stockholders with no assurance that a new attempt would produce a better, or indeed as good, a result. Obviously, appellant railroads are not in favor of the sale of stock to Greyhound and would welcome another opportunity to block that transaction. Their suggestion to this Court, but not to the Commission, is that they should be given another opportunity to frustrate the sale. Surely the Commission is not required to take the risk that they would be successful in light of REA's urgent need for financing.

Appellant's suggestion that "it is possible that the aim of the parties [in framing the two-step transaction] was to secure exactly what the Commission ordered—approval of the establishment of the 20% relationship without scrutiny of its anticompetitive features", Appellants' Brief, pp. 49-50, is amazing in view of the railroad appellants' participation in framing the proposal. They at least know better. We reject the implications of that statement. REA's sole interest is to obtain $10 million for needed improvements and a measure of independence from its railroad stockholders. The interests and aims of the other parties—REA's stockholders, including appellant railroads, and Greyhound—are quite diverse and dictated the two-step approach (*supra*, pp. 10-11). Moreover, the Commission has not, as we pointed out above (*supra*, pp. 27-29) approved the relationship of Greyhound and REA; all it approved was REA's application to issue stock under Section 20a (R. 201).

Finally, there was a third alternative, which the Commission followed. It could and did approve the 20a application, the first step of the transaction, permitted the second step—the tender offer—to take place and carefully reserved to itself the right to consider and approve or disapprove, and to all parties the right to challenge, the final result of the transaction after the consequences of the tender offer become known (R. 201).

Appellants raise in essence now, for the first time, only two practical objections to the Commission's choice of that third alternative. First appellants contend in effect that if the Commission's order is allowed to stand and if the Commission after the tender offer considers the consequences thereof as it says it will, under either Section 5 or Section 7, "much of the damage feared by appellants might be done by the time that proceeding ran its normal, protracted course", Appellants' Brief, p. 47. That argument, of course, has significance only if one assumes that appellants would prevail at the end of such a protracted proceeding. That assumption is doubtful at best, but again we assume *arguendo* that it is so. Also again, a more precise analysis is necessary to view the problem accurately.

The extent of any damage pending determination of a Commission proceeding under Section 5 or Section 7, which appellants allegedly fear, would depend greatly on the outcome of the tender offer. Thus, if the outcome of the tender offer is that Greyhound is left with twenty percent of REA's stock and appellant railroads end up with fifty percent through the exercise of their right of first refusal, no injury to appellants would seem likely. If no stock is tendered to Greyhound, then Greyhound's ability to bring about competitive injury to appellants through its ownership of twenty percent of REA's stock seems at best doubtful. Finally, even if one assumes that Greyhound

will obtain sixty percent of REA's stock, the damage appellants allegedly fear need not occur at all. Clearly, the Commission under Sections 5(7), 5(8) and 16(12), 49 U. S. C. §§ 5(7), 5(8), 16(12) has ample authority to obtain interim relief to prevent continuation of any violation of Section 5 of the Interstate Commerce Act. Moreover, the Commission has similar authority under Section 11 of the Clayton Act, 15 U. S. C. § 21, to prevent any competitive injury to appellants, *FTC* v. *Dean Foods Co.*, 384 U. S. 597 (1966). It must be assumed that the Commission on its own motion, or with the prodding of appellants, would exercise the power given to it in an appropriate manner.

The only other objection which the appellants raise to the alternative selected by the Commission is their claim that they have somehow been deprived of a remedy which they might otherwise have had. They state that "once the section 20a(2) proceeding is terminated, appellants may be without recourse with respect to the probable section 7 violation", Appellants' Brief, p. 48.

That argument is composed of two assumptions. First, it assumes that after the completion of the tender offer, Greyhound's ownership of REA's stock will constitute a violation of Section 7 but not of Section 5,[16] which we accept, *arguendo*. Secondly, it assumes without any conceiveable justification that the Commission will thereupon refuse to discharge its duty and enforce Section 7.

Moreover, it is perfectly clear that the Commission's action under Section 20a(2) has not affected in any way, shape or form any remedy which appellants might otherwise have had. If Greyhound had purchased twenty per-

[16]Appellants concede that they will have a remedy if Greyhound's stock ownership in REA raises a question under Section 5, Appellants' Brief, p. 48.

cent of the issued stock from REA's stockholders or if the stock had been available on the market and purchased in that manner, no approval by the Commission for that purchase would have been necessary under Section 20a. Only because Section 20a requires REA to obtain permission to "issue" the stock is the Commission called upon to act at this stage. All the remedies that appellants ever had they have now. Among those remedies are an application under Section 5(7) with the correlative interim relief, a petition similar to that filed by the Justice Department below under Sections 7 and 11 of the Clayton Act, again with interim relief available, or an action for treble damages under Section 4 of the Clayton Act, 15 U. S. C. § 15. All of those remedies appellants have now and will have if this Court affirms the Commission. They would never have had any other remedies under any other circumstances.

Thus, it seems plain to us that the Commission's selection of the third alternative was most reasonable under all the circumstances and that appellants' objections to that alternative are entirely without foundation.

The exercise of the kind of procedural discretion here brought into play is not only proper but required, if the Commission is adequately to perform the responsibilities delegated to it by Congress. Upon the termination of the tender offer, within sixty days after the initial sale is consummated, one of three factual situations will exist: (1) Greyhound will have secured up to an additional forty percent of REA stock; (2) the railroad appellants will have obtained up to an additional forty percent of REA stock; or (3) the stock ownership of REA will remain as it was upon the consummation of the initial transaction.

If the first possibility occurs, depending upon the number of additional shares acquired by Greyhound, the Commission may find that Greyhound controls REA within the meaning

of Section 5. If so, and if the Commission approves such control as being in the public interest, the transaction will be immune from the antitrust laws under Section 5(11) of the Act, 49 U. S. C. § 5(11), *Seaboard Air Line R. R.* v. *United States,* 382 U. S. 154 (1965); *Minneapolis & St. L. Ry.* v. *United States,* 361 U. S. 173 (1959); *McLean Trucking Co.* v. *United States,* 321 U. S. 67 (1944).

If, as is more likely,[17] the second factual situation comes into existence, the determination of whether Greyhound is in control of REA within the meaning of Section 5 and, if Greyhound is found not to be in control, whether the ownership by Greyhound of twenty percent of REA's stock nevertheless might result in a substantial lessening of competition, is dependent upon which of REA's stockholders acquire additional shares and the number of such shares acquired. As appellants have admitted, "it would indisputably be much more difficult—and impossible if a unified group of railroads acquired the entire 1,000,000 shares—to establish that Greyhound 'controlled' REA", Appellants' Reply to Motions to Affirm, p. 14. Should the Commission find that Greyhound did not control REA within the meaning of Section 5 but that the acquisition by Greyhound of 500,000 shares of REA stock might tend substantially to lessen competition within the meaning of Section 7, the Commission has the power to deal appropriately with that problem under Section 11 of the Clayton Act.

Finally, in the unlikely event that the third possible factual situation comes into being because no present stockholder of REA tenders any stock in response to Grey-

[17]As the Commission found, Greyhound was told by "dissident railroads . . . that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad stockholders . . ." (R. 200; see also App. C, p. 74).

hound's tender offer,[18] the Commission may then consider the arguments prematurely raised by appellants with respect to control or effect upon competition. The crucial difference between the Commission's now canvassing the issues raised by appellants and doing so after the results of the tender offer become known, is that the Commission can base its resolution of those issues upon known facts, rather than upon speculation about future events.

The prudent exercise by a regulatory agency of administrative flexibility has long been recognized, and approved, by this Court as an absolute necessity if administrative agencies are expeditiously to discharge the responsibilities delegated to them. We believe the order under review here was "not only entirely appropriate but in the best tradition of effective administrative practice", *FPC* v. *Tennessee Gas Transmission Co.*, 371 U. S. 145, 155 (1962). See also, *e.g.*, *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U. S. 378, 392 (1959); *SEC* v. *Drexel & Co.*, 348 U. S. 341, 347 (1955); *New Eng. Div. Case*, 261 U. S. 184, 201 (1923).

We now turn to an analysis of whether the action taken by the Commission was permissible under the relevant statutes.

III. The Commission Was Not Required to Resolve the Alleged Control and Competition Issues Under Section 20a(2).

> "[Appellants'] basic position . . . is that, under the 'public interest' and 'lawful objects' standards of section 20a(2), the Commission was not free

[18] It was at the insistence of REA stockholders that the tender offer provision was put into the agreement with Greyhound, which strongly indicates that at least some REA stockholders desire to dispose of their stock. *supra*, p. 11. Moreover, the REA Board was told that at least 900,000 shares would be tendered in response to Greyhound's offer (R. 113).

> to approve the REA-Greyhound transaction in the face of a record disclosing a serious section 7 problem", Appellants' Brief p. 36.

Appellants' support for that contention is to urge that similar language in other statutes requires the Interstate Commerce Commission, the Federal Power Commission and the Federal Communications Commission, in passing upon other kinds of transactions, to give effect to the policy underlying Section 7 of the Clayton Act. That argument is superficial at best and will not bear analysis. As Mr. Justice Holmes observed, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used", *Towne* v. *Eisner,* 245 U. S. 418, 425 (1918).

Turning then to an analysis of Section 20a(2), we point out again that the Commission did not "approve the REA-Greyhound transaction". The Commission approved the issuance of 500,000 shares of stock by REA. The Commission did not either ignore or approve in any way control of REA by Greyhound or any anticompetitive steps to be taken or results which may flow from the transaction. The Commission carefully reserved the right to pass on both the control and the competition issues later (R. 201). If the Commission here has either ignored the alleged anticompetitive features of the proposed transaction or sanctioned a relationship which would bring about those anticompetitive factors, appellants' argument might have some force and the cases cited by appellants—which do relate to final action taken by administrative bodies—would have some relevance here. In other words, if the Commission order under review were the final step in this proceeding, appellants' point might be well taken. The fact that the control and competition issues remain

to be considered makes appellants' contention that the Commission could not "approve the REA-Greyhound transaction in the face of a record disclosing a serious section 7 problem" entirely meaningless.

Appellants concede "that the primary concern of the Congress in enacting section 20a(2) was to equip the Commission with authority to prevent fiscal manipulation", Appellants' Brief, p. 37. Thus, appellants' contention here is, at most, that a collateral purpose of Section 20a(2) was to require the Commission to enforce Section 5 and Section 7. That collateral purpose seems most unlikely on its face and the legislative history of Section 20a(2) makes perfectly clear that no such collateral purpose was ever intended or even considered.

In 1919 the present Section 20a(2) was included in a bill to return the railroads to private ownership following the first World War, H. R. 10453, 66th Cong., 1st Sess. (1919). The design and purpose of the bill was to protect the public from financial manipulation and to insure sound financing by the railroads. In introducing the measure to the House, Congressman Esch, Chairman of the House Committee on Interstate and Foreign Commerce and sponsor of the bill, after referring to Section 20a as "the stock and bond features" of the bill, 58 CONG. REC. 8317 (1919), emphasized that "the public interest" which Section 20a(2) was intended to serve was an interest in sound financing:

> "If our bill of 1914—and perhaps of 1910, but especially of 1914—had been enacted into law, in my opinion we would not have had the shameful financial record of the Frisco, the Rock Island, the Pere Marquette, and the New Haven, had we given the commission the power we seek to give it now. Hereafter, under this bill, there shall be no issue of stocks or bonds without a certification from the

commission that they are necessary and needful in the public interest." 58 CONG. REC. 8318 (1919).

In the course of the debate on the bill, Congressman Green discussed the public's interest in not having to pay excessive railroad rates because of dividends on "watered stock" for which value had not been paid in (*id.* at 8664); Congressman Robinson emphasized the public's interest in being protected from the sale of "watered stock" itself (*id.* at 9163); and Congressman Madden summed up the purposes of Section 20a(2):

> "The Interstate Commerce Commission, under this bill, is given wide powers. It is authorized to prohibit the issuance of stocks and bonds by any road in the United States without first having all the facts presented upon which the proposed issue is to be based, so that henceforth, whatever may have been the practice in the past in that respect, this bill gives the assurance that no watered stocks on any railroad properties can be issued", 59 CONG. REC. 8833 (1920).

Similarly the "color and content" of the "lawful object" language seized upon by appellants were entirely related to the Congressional intent to prevent financial manipulation. Congressman Rayburn's remarks during the debate on the bill illustrate the view of the drafting committee:

> "Of course the credit of the railroads has been destroyed. But if we write into the law of the land a statute to the effect that before a railroad can issue new securities, before it can put them on the market, it must come before the properly constituted governmental agency, lay the full facts of its financial situation before that body, tell that body what it

intends to do with the money derived from the sale of the issue of securities, and after it has received the approval of that regulating body and it goes out and puts those securities on the market, then the Interstate Commerce Commission by this law is empowered at any time to call it to account and have it tell to that regulating body that it expended the money, the proceeds of the sale of securities, for the purposes for which it had made the application. Then we shall have railroad securities that will stand for value in the markets of this country and in the markets of all the world. . . ." 58 CONG. REC. 8376 (1919).

That the purpose of the "lawful object" language is to require disclosure of the purpose of the proceeds of the issue and to discourage manipulation of securities by insiders by compelling the issuer to state an object wholly within its corporate charter, to account for the proceeds of the issue, and to show that they were actually expended for the stated purpose is substantiated by the Commission's continuing construction since 1922. In an order of May 25, 1922, the Commission established the form and content required for applications under Section 20a(2),[10] recognizing five general lawful objects which could constitute a valid purpose of an issue: (1) acquisition of property other than equipment; (2) acquisition of equipment; (3) construction, completion, extension or improvement of facilities

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[10] *In The Matters Of (A) Applications Under Section 20a of the Interstate Commerce Act for Authority to Issue Securities or to Assume Obligations or Liability with Respect to the Securities of others, etc.*, quoted in MACVEAGH, THE TRANSPORTATION ACT OF 1920, at 489-501 (1923). Its provisions remained substantially unchanged until 1964 (see 49 C. F. R. §§ 56.1-56.6 (1963)) when they were revised and simplified, 29 Fed. Reg. 11127 (1964).

(expenditures not yet made); (4) discharge or refunding of existing obligations; and (5) reimbursement of money expended from income or from other moneys in the treasury of the applicant.

The courts have consistently held that the purposes of the "public interest" and "lawful object" requirements of Section 20a are "to maintain a sound structure for support of railroad credit to aid in developing a national transportation system" and to "protect the investing public against faulty or dishonest financing" resulting in "dissipation of railroad resources", *Chicago S. S. & S. B. R. R.* v. *United States*, 221 F. Supp. 106, 108 (N. D. Ind. 1963); *Breswick & Co.* v. *United States*, 156 F. Supp. 227, 234 n. 15 (S. D. N. Y. 1957), *rev'd on other grounds sub nom. Allegheny Corp.* v. *Breswick & Co.*, 355 U. S. 415 (1958); *Pittsburgh & W. V. Ry.* v. *ICC*, 293 Fed. 1001, 1004 (D. C. Cir. 1923), *appeal dismissed*, 266 U. S. 640 (1924); *Minneapolis St. P. & S. Ste. M. Ry.* v. *Railroad Comm'n*, 197 N. W. 352, 356-57 (Wis. 1924); see also 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 190 (1931). Our research has revealed no instance prior to this case where anyone has suggested that the Clayton Act or Section 5 is incorporated in Section 20a(2).

Appellants' only point in this connection is that the legislative history does not contain a statement that Congress did not intend to incorporate the Clayton Act or Section 5 into Section 20a(2), Appellants' Brief, p. 37. Certainly, that contention is a lame argument.

The pattern of the Transportation Act of 1920, of which both Section 5[20] and Section 20a(2) were parts, 41 Stat.

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[20]As originally enacted, Section 5 did not, as it now does, 49 U. S. C. § 5(1), specifically preclude acquisition of control of one carrier by another, 41 Stat. 480 *et seq.* (1920). It also contemplated consolidation of railroads in accordance with a master plan to be developed by the Commission, *id.* at 482, an approach which was thereafter abandoned. See *St. Joseph Paper Co.* v. *Atlantic C. L. R. R.*, 347 U. S. 298, 315-21 (1954).

456, 480, 494 (1920), also demonstrates the speciousness of appellants' arguments. Section 5, which provides for authorization by the Commission of a complete elimination of competition between two carriers through control, merger, lease, or other method of consolidation, cloaks the Commission with the power to grant immunity from the antitrust laws for an approved transaction. Section 20a(2) on the other hand, although enacted by the same Congress, provides for no such authorization or grant of immunity. Thus, under appellants' construction, the 66th Congress adopted the erratic policy of relaxing enforcement of the antitrust laws when competition was eliminated but requiring strict enforcement when lesser competitive harm might occur.

As noted above, both Southern Pacific and Transcontinental Bus System, *et al.*, recognized the limited function of Section 20a(2) (*supra*, pp. 17-18). Indeed Transcontinental Bus System, *et al.*, conceded expressly that Section 20a(2) does not allow "the presentation of the issues necessary for a determination of the question as to whether Greyhound should be allowed to consolidate its facilities and operations with those of R. E. A." (R. 66-67). That concession is clearly correct.

Section 20a(2) was set up to deal with a particular category of financial matters and to resolve those matters on their own merits expeditiously—with a hearing only if the Commission "sees fit", Interstate Commerce Act, § 20a(6), 49 U. S. C. § 20a(6). It is neither necessary nor desirable to require the Commission to discharge its duties under the Clayton Act or Section 5 through a tortured reading of the "public interest" and "lawful object" language of Section 20a.

IV. The Commission Was Not Required to Resolve the Alleged Control and Competition Issues Under Section 5 of the Interstate Commerce Act or Section 7 of the Clayton Act Prior to the Granting of REA's Section 20a Application

In extremely vague language, appellants seem to contend that the Commission erred by not holding full-scale hearings and resolving finally and completely the alleged issues of control and competition under Section 5 of the Interstate Commerce Act and Section 7 of the Clayton Act. Appellants' position as stated completely begs the issue. They summarize their conclusion thus:

> "Where an agency is entrusted by the Congress with the responsibility of enforcing two statutory provisions, and where in the course of a proceeding under one it becomes evident that a violation of the other would probably result if the agency grants the authority sought, the agency may not proceed without making appropriate determinations relating to both provisions", Appellants' Brief, p. 42.

That statement applies equally to appellants' contentions under Section 7 and Section 5. Appellants' Brief, pp. 42, 54.

If all that appellants are saying is that an agency is required to discharge its responsiblity under all of the authority granted to it, and that is all the cases cited by appellants stand for at best (Appellants' Brief, p. 44), then we are in complete agreement with them. But the last clause of appellants' statement of their position evades the whole problem, because the question here is whether the Commission's postponement of consideration of the alleged control and competition issues was an "appropriate determination". It may well be that in some cases it is appropriate and desirable for an administrative body to coordinate enforce-

ment of statutory provisions by determining to dispose of related problems concurrently. It seems to us equally permissible for an administrative body to coordinate the enforcement of related statutory provisions by passing upon related matters consecutively. Clearly if the latter procedure is permissible, discretion to choose between the two proceedings must be left to the administrative body, *cf., Universal Camera Corp.* v. *NLRB,* 340 U. S. 474, 488 (1951). Rather than meeting that contention and the reasons recited by the Commission and the district court, appellants repeatedly try to suggest that the Commission has bypassed or avoided the alleged control and competition issues for all time. The Commission's Order explicitly stated the contrary (R. 201).

The question whether the Interstate Commerce Commission may properly act upon an application under Section 20a before it resolves alleged problems of control is not a matter of first impression in this Court. In two cases, both styled *Alleghany Corp.* v. *Breswick & Co.,* this Court held "that the Commission properly exercised that jurisdiction [over Alleghany] in authorizing the issuing of stock without approving the acquisitions of control of Central", *Alleghany Corp.* v. *Breswick & Co.,* 355 U. S. 415, 421 (1958) (dissenting opinion). While it may be that this question was resolved sub silentio, we agree with the dissent that it was in fact resolved.

The Alleghany litigation arose out of a proceeding in which the Commission had granted an application by Alleghany under Section 20a, which had the effect of exempting Alleghany from the Investment Company Act of 1940, 15 U. S. C. §§ 80a-1—80a-52. The Commission had jurisdiction over Alleghany, if at all, only because Alleghany controlled the New York Central Railroad. Such control had been acquired by Alleghany without first obtaining au-

thority from the Commission under Section 5. The first time it considered the case on the merits, the district court reversed the Commission's grant of authority under Section 20a, holding that the Commission could not predicate its jurisdiction to grant such authority on control which the court found to have been illegally acquired without prior approval by the Commission under Section 5 of the Act. *Breswick & Co.* v. *United States,* 138 F. Supp. 123 (S. D. N. Y. 1955), *rev'd sub nom. Alleghany Corp.* v. *Breswick & Co.,* 353 U. S. 151 (1957).

In reversing that decision, this Court held that the Commission had jurisdiction over Alleghany so long as Alleghany exercised actual control over Central, whether such control had been approved by the Commission or not, and remanded the case for consideration of the question whether the stock issue approved by the Commission was in violation of the Act, *Alleghany Corp.* v. *Breswick & Co.,* 353 U. S. 151 (1957). On remand the district court held, in language which almost seems to come from the brief of appellants in the present case, that the Commission could not properly have granted authority to issue securities unless the control question had first been resolved:

> "Under these circumstances, should authorization of the issue of stock be permitted to stand? We do not see how the adequacy of the security of the new preferred could be calculated until this question [of control] is resolved or at least considered. . . . In the absence of compelling reasons to the contrary, as to which no findings were made, authorization of continued control should logically be determined before the stockholders act upon the proffered exchange and before the stock becomes available for sale to the public, not afterwards. To say the least, it would be arbitrary to authorize the issue

without even considering the effect of divestiture upon the value of this important asset as long as that action remains a possibility. Reconsideration by the Commission for that purpose is therefore necessary. . . ." *Breswick & Co.* v. *United States*, 156 F. Supp. 227, 233-34 (S. D. N. Y. 1957), *rev'd sub nom. Alleghany Corp.* v. *Breswick & Co.*, 355 U. S. 415 (1958) (footnote omitted).

The court set forth the type of action which the Commission, in the court's view, should have taken to resolve the control issues under Section 5. Finally, the court held:

> "We have now recognized the Commission's jurisdiction. This unquestionably includes the power to authorize the issue of the preferred stock in question but we hold that although there might be circumstances when such action could reasonably be taken before approving the acquisition of control over the Central System, there were no findings or facts which justify such action in the present case." 156 F. Supp. at 237.

The case was again reversed by this Court:

> "PER CURIAM.
>
> "The judgment of the District Court is reversed and the case is remanded for consideration by that court of the only claim that was left open at this Court's prior disposition of this litigation, to wit, whether 'the preferred stock issue as approved by the [Interstate Commerce] Commission was in violation of the Interstate Commerce Act.' *Alleghany Corp.* v. *Breswick & Co.*, 353 U. S. 151, 175." *Alleghany Corp.* v. *Breswick & Co.*, 355 U. S. 415, 416 (1958).

On the second remand of the case, the district court affirmed the Commission's order under Section 20a. *Breswick & Co.* v. *United States,* 160 F. Supp. 754 (S. D. N. Y. 1958).

We believe the facts of the *Alleghany* case are much stronger than those in this proceeding in favor of the sort of rule appellants seek. In that case, the Commission found that Alleghany had already obtained the alleged unlawful control and no reservation was made there, as it was here, for appropriate resolution of the control problem in the immediate future, *Louisville & J. B. & R. R. Merger,* 290 I. C. C. 725 (Div. 4), *aff'd,* 295 I. C. C. 11 (1955). Moreover, the facts in *Alleghany* were all known; here the crucial facts relating to the alleged control and competition issues cannot now be determined. Even the district court in that case concluded, prior to the second remand, that there might be circumstances where a Section 20a approval would be appropriate before the acquisition of control were approved or disapproved, 156 F. Supp. at 237. Thus, we do not believe that our case stands or falls on the Alleghany decisions. We do believe that where, as here, the attempt to resolve the alleged control and competition issues would, in the words of the district court, be "an exercise in futility" (R. 416), it was proper for the Commission to authorize REA's Section 20a application and to reserve jurisdiction on the alleged control and competition issues for later determination.

V. The Hearing Question

Appellants now suggest that the district court did not understand their positions below with respect to the requirement of a hearing prior to approval of REA's stock issuance and disposed of their arguments on inadequate grounds, Appellants' Brief, p. 57. That argument is based upon a distortion of the district court's opinion and appellants' own pleadings.

Appellants now concede that "it was indisputably within the Commission's discretion to pass upon the fiscal aspects of the REA proposal without a hearing" and that "the hearing issue is distinctly collateral to the [Section 5 and Section 7] issues", Appellants' Brief, p. 57. Their contentions below were quite the opposite. For instance, in their complaint, which was adopted by other appellants (*supra*, p. 20), appellant railroads alleged that the Commission's findings were without reference to Section 5 or Section 7, "deficient in that they were made upon mere allegations in the pleadings without the benefit of evidence in opposition" (R. 316). That allegation also appeared *in haec verba* in appellant truck lines' complaint (R. 338-39). Indeed, appellants argued below that the hearing question was one of constitutional dimension (R. 316, 327, 338).

Moreover, contrary to appellants' statement that the district court disposed of the hearing question solely by reference to Section 20a(6), it is abundantly clear that the court considered that question in light also of Section 5 and Section 7. The court observed that the "main thrust" of appellants' arguments there was that a hearing was required and held that "consideration of this issue requires an analysis of the statutes upon which reliance is placed" (R. 411). In the next three succeeding paragraphs, the court reviewed seriatim the relevant provisions of Section 20a, Section 5 and Section 7 (R. 411-12). The court began the fourth succeeding paragraph with the statement, "The argument is that approval of the stock issuance may not be given without determination, after hearing," of the Section 5 and Section 7 issues (R. 412). Finally, after a full discussion of all the issues raised below by appellants, the court held that "until the facts are developed . . ., hearings on control or competitive effects are no more than an exercise in futility" (R. 416).

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX A

Statutes

Interstate Commerce Act, Section 5(8), 24 Stat. 380, as amended, 49 U. S. C. § 5(8):

"(8) **Jurisdiction of injunctions, etc. against violations of section or orders.** The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order."

Interstate Commerce Act, Section 14(1), 24 Stat. 384, as amended, 49 U. S. C. § 14(1):

"(1) Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

Interstate Commerce Act, Section 16(12), 24 Stat. 384, as amended, 49 U. S. C. § 16(12):

"(12) **Proceedings to enforce orders other than for payment of money.** If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district

court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

Interstate Commerce Act, Section 20a(6), 41 Stat. 494, as amended, 49 U. S. C. § 20a(6):

"(6) Upon receipt of any such application for authority the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service, or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."

Administrative Procedure Act, Section 8, 60 Stat. 242, 5 U. S. C. § 1007:

"In cases in which a hearing is required to be conducted in conformity with section 1006 of this title——

"(a) . . .

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Administrative Procedure Act, Section 10(e), 60 Stat. 243, 5 U. S. C. § 1009(e):

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or

limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

APPENDIX B

RAILWAY EXPRESS AGENCY, INCORPORATED BY-LAWS.

ARTICLE I.

STOCK.

SECTION 1. The certificates of stock of the corporation shall be numbered and shall be entered in the books of the corporation as they are issued. They shall set forth the holder's name and the number of shares and shall be signed by the President or a Vice-President and the Secretary or an Assistant Secretary.

SECTION 2. Transfers of stock shall be made on the books of the corporation only by the person named in the certificate or by attorney lawfully constituted in writing and upon surrender of the certificate therefor.

SECTION 3. The Board of Directors may close the stock transfer books in their discretion for a period not exceeding forty days preceding the date of any meeting of stockholders or the date for the allotment of any rights.

SECTION 4. The corporation shall be entitled to treat the holder of record of any share or shares of stock as the holder in fact thereof and shall not be bound to recognize any equitable or other claim to or interest in such share on the part of any other person, whether or not it shall have express or other notice thereof, save as expressly provided by the laws of Delaware.

Appendix B

ARTICLE II.

Stockholders' Meetings.

Section 1. All meetings of the stockholders shall be held at the office of the corporation in the City of New York, State of New York.

Section 2. An annual meeting of stockholders shall be held on the first Wednesday of April in each year at eleven o'clock A. M., at which meeting there shall be elected by ballot a Board of Directors, not to exceed twenty-five in number. There may be seven Directors-At-Large, and the others shall be the persons nominated by districts as provided in Section 8 of this Article; provided, however, that if at any time any corporation or corporations engaged in whole or in part in the common carriage of passengers by bus (hereinafter called Bus Company Stockholders) are the holders of at least 20% of the stock issued and outstanding, the Bus Company Stockholders shall be entitled to nominate five of the Directors-At-Large in the manner provided in the next succeeding paragraph. The number, not to exceed eighteen, so nominated by districts shall be determined as provided in said Section 8. At such meeting there shall be transacted such other business as may properly be brought before the meeting.

Not more than thirty nor less than fifteen days prior to the date of the annual meeting of stockholders, the Secretary of the Corporation shall, if Bus Company Stockholders hold at least 20% of the issued and outstanding stock, send to each Bus Company Stockholder a form of vote for the number of and for nominations for five Directors-At-Large. Each Bus Company Stockholder receiving the same

shall thereupon name the persons proposed by such Bus Company Stockholder as nominees for five Directors-At-Large and return such vote to the Secretary with a statement of the number of shares voted by such Bus Company Stockholder in favor of each such nominee. Each Bus Company Stockholder shall be entitled to the same number of nominating votes for each of its said nominees for directors as the number of shares of stock which such Bus Company Stockholder will be entitled to vote at such annual meeting. The Secretary shall canvass the nominating votes of the Bus Company Stockholders received by him prior to such annual meeting and shall report the same to the stockholders at the meeting. The five nominees receiving the most nominating votes shall be the nominees for the five Directors-At-Large to be nominated by the Bus Company Stockholders.

SECTION 3. The holders of a majority of the stock issued and outstanding, present in person, or represented by proxy, shall be requisite and shall constitute a quorum at all meetings of the stockholders for the transaction of business except as otherwise provided by law, by the certificate of incorporation or by these by-laws. If, however, such majority shall not be present or represented at any meeting of the stockholders, the stockholders present in person, or by proxy, shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until the requisite amount of stock shall be present. At such adjourned meeting at which the requisite amount of stock shall be represented any business may be transacted which might have been transacted at the meeting as originally notified.

SECTION 4. At each meeting of the stockholders every stockholder shall be entitled to vote in person, or by proxy appointed by an instrument in writing subscribed by such stockholder and bearing a date not more than thirty days prior to said meeting, unless said instrument provides for a longer period. Each stockholder shall have one vote for each share of stock registered in its name on the books of the corporation, except that no share of stock shall be voted at any election for directors which has been transferred on the books of the corporation within twenty days next preceding such election. The vote for directors, and, upon demand of any stockholder, the vote upon any question before the meeting, shall be by ballot. All elections shall be had and all questions decided by a plurality vote.

SECTION 5. Written notice of the annual meeting of stockholders shall be mailed to each stockholder at such address as appears on the stock book of the corporation, at least ten days prior to the meeting. A complete list of the stockholders, arranged in alphabetical order, with the address of each, and the number of shares held by each, shall be prepared by the Secretary and filed in the office where the election is to be held, at least ten days before every election, and shall at all times, during the usual hours for business, and during the whole time of said election, be open to the examination of any stockholder.

SECTION 6. Special meetings of the stockholders, for any purpose or purposes, unless otherwise prescribed by statute, may be called by the President, and shall be called by the President or Secretary at the request in writing of a majority of the Board of Directors, or at the request in writing of stockholders owning a majority in amount of

the entire capital stock of the corporation issued and outstanding. Such request shall state the purpose or purposes of the proposed meeting. Business transacted at all special meetings shall be confined to the objects stated in the call. Written notice of a special meeting of stockholders, stating the time and place and object thereof shall be mailed, postage prepaid, at least ten days before such meeting, to each stockholder at such address as appears on the books of the corporation.

SECTION 7. The President shall act as chairman of all meetings of stockholders. In his absence a chairman shall be elected by the meeting.

SECTION 8. Of the total number of directors to be elected at the annual meeting of stockholders, a maximum of eighteen shall be nominated by districts as provided in this section. For the purposes of such nomination the continental United States shall be divided into three districts known as the Eastern District, the Southern District and the Western District.

The Eastern District shall be bounded by the Atlantic Seaboard from the Canadian boundary to Norfolk, Virginia, by the main line of the Norfolk and Western Railway from Norfolk, Virginia, to Kenova, West Virginia, by the main line of the Chesapeake & Ohio Railway from Kenova, West Virginia, to Cincinnati, Ohio, by the Ohio River from Cincinnati, Ohio, to Cairo, Illinois, by the Mississippi River from Cairo, Illinois, to the mouth of the Illinois River at or near Grafton, Illinois, by the Illinois River from Grafton, Illinois, to Pekin, Illinois, by a line south and east of the Atchison, Topeka and Santa Fe Rail-

way from Pekin, Illinois, through Joliet and Streator, Illinois, to Chicago, Illinois, by a line drawn from Chicago, Illinois, to include the Southern Peninsula of Michigan and thence following the Canadian boundary to the Atlantic Seaboard; including, however, the Norfolk and Western Railway, the Chesapeake & Ohio Railway, the Canadian National Railways and the Virginian Railway.

The Southern District shall be bounded by the Atlantic Seaboard on the east, by the Eastern District on the north, by the Mississippi River on the west, and by the Gulf of Mexico on the south.

The Western District shall be bounded by the Eastern District and the Southern District on the east, by the Gulf of Mexico and the Mexican boundary on the south, by the Pacific Ocean on the west, and by the Canadian boundary on the north.

Each railroad corporation which is the holder of stock of the corporation shall be deemed a member of the district in which its line of railroad is located, or, if located in more than one district, of the district in which the greater portion of the main-line mileage of its system is located, excluding, however, mileage of any controlled company which is itself a holder of stock of the corporation.

Not more than seven directors shall be nominated by the members of the Eastern District, not more than six directors by the members of the Western District, and not more than five directors by the members of the Southern District. Prior to thirty days before the date of the annual meeting of stockholders, the incumbent directors from each district shall cause the Secretary of the Corporation to be advised in writing of their determination made by majority vote of the number of directors, not to exceed the numbers set forth in

the preceding sentence, to be nominated by such district to serve during the ensuing year. Such number shall be effective for each district unless changed at the annual meeting of stockholders by majority vote of the stockholders of such district. In the event of failure of the directors of any district to advise the Secretary of a determination of the number of directors of such district, the number submitted by the Secretary to the stockholders shall be the number for such district at the time of submission.

Not more than thirty nor less than fifteen days prior to the date of the annual meeting of stockholders, the Secretary of the Corporation shall send to each holder of stock of the corporation a form of vote for the number of and for nominations for directors from the district of which such stockholder is a member, stating the number of directors, determined as set forth hereinabove, to be nominated by the members of such district. The stockholder receiving the same shall thereupon name the persons proposed by such stockholder as nominees for directors from the district of which such stockholder is a member and return such vote to the Secretary with a statement of the number of shares voted by such stockholder in favor of each such nominee. The number of persons proposed by each stockholder shall not exceed the number specified by the Secretary for the district of which such stockholder is a member, unless such stockholder is voting that a different number of directors be nominated by his district. Each stockholder shall be entitled to the same number of nominating votes for each of its said nominees for directors from the district as the number of shares of stock which such stockholder will be entitled to vote at such annual meeting.

The Secretary shall canvass the nominating votes of the members of each district received by him prior to such

annual meeting, and shall report the same to the stockholders at the meeting. The number of persons, equal to the number determined as set forth hereinabove for such district, receiving the most nominating votes in each district shall be the nominees of that district.

ARTICLE III.

Directors.

Section 1. The property and business of the corporation shall be managed by its Board of Directors. Directors need not be stockholders. They shall be elected at the annual meeting of the stockholders, and each director shall be elected to serve until his successor shall be elected and shall qualify.

Section 2. A vacancy in the Board of Directors resulting from the resignation or death of a director elected on the nomination of stockholders of a district shall be filled for the unexpired term by the election of a person nominated by the remaining directors for such district by majority vote; provided, however, that such remaining directors for such district may, by majority vote, elect not to fill such vacancy but to reduce the number of directors for such district. At any time when the number of directors nominated by the stockholders of any district is less than the maximum number for such district as specified in Section 8 of Article II of these by-laws, the directors for such district may, by majority vote, increase their number up to such maximum number, and the resulting vacancies shall be filled for the unexpired term by election of the person or persons nominated by such directors. Any

vacancy in the positions of Director at Large may be filled for the unexpired term by a vote of the majority of the remaining directors.

SECTION 3. The directors may hold their meetings and have one or more offices and keep the books of the corporation, except the original or duplicate stock ledger, outside of the State of Delaware, at the office of the corporation in the City of New York, State of New York, or at such other places as they may from time to time determine.

SECTION 4. In addition to the powers and authorities by these by-laws expressly conferred upon them, the Board may exercise all such powers of the corporation and do all such lawful acts and things as are not by statute or by the certificate of incorporation or by these by-laws directed or required to be exercised or done by the stockholders.

SECTION 5. Directors, as such, shall not receive any stated salary for their services, but by resolution of the Board, a fixed sum and expenses of attendance, if any, may be allowed for attendance at each regular or special meeting of the Board; provided, that nothing herein contained shall be construed to preclude any director from serving the corporation in any other capacity and receiving compensation therefor.

SECTION 6. Regular meetings of the Board may be held without notice at such time and place as shall from time to time be determined by the Board.

SECTION 7. Special meetings of the Board may be called by the President on not less than three days' notice

to each director, either personally or by mail or by telegram; special meetings shall be called by the President or Secretary in like manner and on like notice on the written request of three directors.

SECTION 8. Except as may be otherwise specifically provided by statute or by the certificate of incorporation or by these by-laws, at all meetings of the Board a majority of the directors who are qualified to act shall be necessary and sufficient to constitute a quorum for the transaction of business, and the act of a majority of such directors present at any meeting at which there is a quorum shall be the act of the Board of Directors, provided, however, that for the purpose of accepting resignations of directors and filling any vacancy or vacancies (including newly created directorships) in the Board the directors present qualified to act shall constitute a quorum.

ARTICLE IV.

EXECUTIVE COMMITTEE.

There may be an Executive Committee elected by the Board of Directors from its members, of such number as the Board shall determine, whose terms of office shall continue during the pleasure of the Board. Said Committee may meet at stated times, or on notice given by the Secretary. During the intervals between meetings of the Board such Committee shall advise with and aid the officers of the corporation in all matters concerning its interests and the management of its business, and generally perform such duties and exercise such powers as may be directed or dele-

gated by the Board of Directors from time to time. The Board may delegate to such Committee authority to exercise all the powers of the Board (excepting power to amend the by-laws), while the Board is not in session. Vacancies in the membership of the Committee shall be filled by the Board of Directors. The Executive Committee shall keep regular minutes of its proceedings and report the same to the Board at its next succeeding meeting.

ARTICLE V.

OFFICERS.

SECTION 1. The Board of Directors at its first meeting after election by the stockholders shall organize by the election from their own number of a President and by the appointment of a Secretary, an Assistant Secretary, a Treasurer and Assistant Treasurers, who need not be members of the Board. The Board of Directors may also from time to time appoint such additional assistant secretaries and such additional assistant treasurers, to perform specific duties, as it may deem necessary.

SECTION 2. The Board of Directors may also appoint such Vice-Presidents and other officers, agents and factors as the Board may from time to time deem necessary, who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by the Board or as shall be assigned to them by the President.

SECTION 3. The Board of Directors may designate any Vice-President to act as President in case of the absence or disability of the President.

SECTION 4. The Board of Directors shall have power at any time to remove any officer and this by-law shall form a part of the contract with every officer.

ARTICLE VI.

PRESIDENT.

SECTION 1. The President shall be the chief executive officer of the corporation and, in the absence of an elected chairman, shall preside at all meetings of the Board of Directors. He shall have, subject to the Board of Directors, general supervision, control and management of the property and business of the corporation, and of all its departments, officers, employees and agents.

SECTION 2. Unless otherwise ordered by the Board of Directors, the President shall have full power and authority in behalf of Railway Express Agency, Incorporated, in person or by written proxy, executed by him in the name of the corporation and under its corporate seal, attested by the Secretary, to attend and to act and to vote at any meeting of stockholders of any corporation in which the Railway Express Agency, Incorporated, may hold stock; and, at any such meeting, he shall possess and in person or by such proxy may exercise any and all rights and powers incident to the ownership of such stock, and which as the owner thereof it might have possessed or exercised if present. The Board of Directors by resolution, from time to time, may confer like powers upon any other person or persons.

Appendix B

ARTICLE VII.

SECRETARY.

SECTION 1. The Secretary shall attend all meetings of the Stockholders and of the Board of Directors and of the Executive Committee. He shall keep an accurate record of the proceedings at such meetings and shall notify the several officers of the corporation of action taken concerning matters in their respective departments. He shall be custodian of the seal of the corporation. He shall give or cause to be given notice of all meetings of the stockholders and of the Board of Directors and Executive Committee and shall perform such other duties as may from time to time be prescribed by the Board of Directors or by the President.

SECTION 2. The Secretary and/or any Assistant Secretary shall keep and have the custody of the stockbooks of the corporation, and shall transfer all stock, bonds and other securities of the corporation.

SECTION 3. In the absence or disability of the Secretary, the Assistant Secretary shall perform the duties of the Secretary and shall perform such other duties as may be assigned to him by the Secretary or by the President.

ARTICLE VIII.

TREASURER.

SECTION 1. The Treasurer shall have the custody of the funds and securities of the corporation. He shall deposit funds received by him for account of the corpora-

tion, and require agents and others who collect and receive operating revenues and other funds for account of the corporation to deposit the same, in such banks or other depositaries as the Board of Directors or the President may designate from time to time. He shall show the disposition of all moneys that may pass through his hands, in books belonging to the corporation kept for that purpose. He shall disburse the funds of the corporation under the authority of the Board of Directors or the President, or may authorize others to do so, under such regulations as may be approved by the Board of Directors or the President, taking proper vouchers for such disbursements. He shall make such reports to the Board of Directors and to the President of the transactions of his office as shall be called for, and shall perform such other duties connected with the finances of the corporation as may from time to time be assigned to him by the Board of Directors or the President.

SECTION 2. All securities in the custody of the Treasurer shall be held in safe deposit vaults designated by the Board of Directors or the President subject to such regulations in respect to access thereto or deposit or withdrawal thereof, as may from time to time be ordered by the Board of Directors or the President.

SECTION 3. He shall give a bond with one or more sureties, conditioned upon the faithful discharge of his duties, which bond and the amount thereof shall be approved by the Board of Directors or by the President.

SECTION 4. The Assistant Treasurers shall perform such duties as may be required of them by the Treasurer

or by the President, and shall each give a bond, with one or more sureties, conditioned upon the faithful discharge of his duties, which bonds and the amounts thereof shall be approved by the Board of Directors or the President.

ARTICLE IX.

Each member of the Board of Directors and each officer of the corporation, and former directors and officers, their heirs, executors and administrators, and any person who may have served at this corporation's request as a director or officer of another corporation in which this corporation owns shares of capital stock, shall be indemnified by this corporation against expenses actually and necessarily incurred by them in connection with the defense of any action, suit or proceeding in which such director or officer is made a party by reason of his being or having been a director or officer as aforesaid, except in relation to matters as to which he shall be finally adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of his duties as such director or officer. As used in this article, expenses shall include amounts of judgments against, or amounts paid in settlement by, such director or officer, other than amounts payable or paid to the corporation. The foregoing indemnification shall not be deemed exclusive of any other rights to which such director or officer may be entitled, under any by-law, agreement, vote of stockholders, or otherwise.

Appendix B

ARTICLE X.

TARIFFS.

The General Traffic Manager, Assistant General Traffic Manager or Traffic Manager of the corporation shall be authorized by this by-law to prepare and issue tariffs of the tolls to be charged for all traffic carried by the corporation, and to submit the same and to file the same with the Board of Transport Commissioners for Canada, as required by the Railway Act of Canada.

ARTICLE XI.

AMENDMENTS.

These by-laws may be altered or amended by the affirmative vote of a majority of the stock issued and outstanding and entitled to vote at any regular or special meeting of stockholders, if notice of the proposed alteration or amendment be contained in the notice of the meeting, or by the affirmative vote of a majority of the Board of Directors at a regular or special meeting of the Board; provided, however, that no alteration or amendment be made in the number of directors of this corporation or in the method of nominating the directors of this corporation except by the affirmative vote of two-thirds of the stock issued and outstanding and entitled to vote; and provided, further that no change of the time or place for the election of directors shall be made within sixty days next before the day on which such election is to be held, and that in case of any change of such time or place, notice thereof shall be given to each stockholder in person or by letter mailed to its last

known post-office address at least twenty days before the election is held; and provided, further that if any such alteration or amendment be made in the number of Directors of this Corporation or in the method of nominating Directors-At-Large of this Corporation, said affirmative vote of two-thirds of the stock issued and outstanding and entitled to a vote shall, if Bus Company Stockholders hold at least 20% of the issued and outstanding stock, include a majority of the issued and outstanding stock held by the Bus Company Stockholders.

ARTICLE XII.

SEAL.

The corporate seal is, and, until otherwise ordered by the Board of Directors, shall be, an impression, circular in form, with the words "Railway Express Agency, Incorporated" on the outer edge thereof, and the words and figures "Corporate Seal", "1928", "Delaware" in the center thereof.

APPENDIX C

THE GREYHOUND CORPORATION
140 South Dearborn Street
Chicago 3, Illinois

OFFICE OF THE GENERAL COUNSEL
601 California Street
San Francisco, California

December 3, 1964

AIR MAIL

Mr. Richard Block, Jr.
Assistant Director
Bureau of Finance
Interstate Commerce Commission
Washington, D. C. 20423

Docket No. 23324

Dear Mr. Block:

This is in response to your letter of November 24, 1964, in which it is suggested that The Greyhound Corporation ("Greyhound") file an application under Section 5(2) of the Interstate Commerce Act to acquire control of Railway Express Agency, Incorporated ("R E A"), which application you say may be accompanied by a motion to dismiss. At the time when Greyhound agreed to acquire a 20% interest in R E A, careful consideration was given to the necessity or even the desirability of following the precise procedure which you suggest. However, it appeared so clear to us at the time that there was no possibility of actual control through the acquisition of a 20% interest that it was determined that no Section 5 application should be filed. That is still our view.

Appendix C

The Commission has before it, through submissions of R E A in Finance Docket No. 23324, all of the relevant facts. These facts show that Greyhound attempted to acquire stock control of R E A, later agreed to accept equal stock ownership with the railroads, and finally agreed to purchase the 20% stock interest as set forth in Finance Docket No. 23324. Our view that the transaction pending before the Commission in that docket would not result in control by Greyhound was based principally upon the following circumstances:

(1) Greyhound would have only a 20% stock interest in R E A.

(2) Greyhound would not be in a position to acquire any further stock interest in R E A since all of the outstanding R E A stock is subject to a right of first refusal of the existing railroad shareholders. We were told in negotiations by representatives of the railroads, including representatives of the Southern Pacific Company that Greyhound would not acquire one additional share of the presently outstanding stock.

(3) The make-up of the Board of Directors of R E A under the bylaws, as amended, would not permit Greyhound to control the Board of Directors.

(4) The negotiations with the railroads for acquisition of an interest in R E A demonstrated to us that the railroads act in groups, each of which controls more stock than Greyhound would have.

These circumstances indicated to Greyhound that there would be no possibility of exercising control over R E A. Accordingly, Greyhound does not desire to be authorized to acquire control of R E A, since it would not want to assume the responsibility which might be attributed to such ostensible control when it would have no power of actual control.

Greyhound feels, therefore, that it must respectfully decline to file a Section 5 application, and it reiterates what it said in its petition for leave to intervene in Finance Docket No. 23324, namely, that if in the future it should appear that there is any possibility of such control by Greyhound, Greyhound will file the necessary Section 5 application.

Very sincerely yours,

/s/ GERALD H. TRAUTMAN
Gerald H. Trautman

APPENDIX D

Neither the Commission nor the district court decided anything with respect to the control or competition issues except that consideration of them "would not be appropriate at this time" (R. 200, 416). We have thus assumed *arguendo* in the body of our brief that a serious question with respect to competitive effect was presented and, we contend, properly deferred. Nevertheless, since appellants' definition of the relevant market colors their entire argument and since it has the virtue of superficial simplicity and conveys the erroneous impression that, although no party suggested appellants' present definition in the proceedings below, it must have been obvious to the Commission, we are impelled to comment briefly on that aspect of their argument.

APPELLANTS' NOVEL DEFINITION OF THE RELEVANT MARKET IS INCONSISTENT WITH COMMISSION FINDINGS IN THE SAME AREA AND CANNOT BE RECONCILED WITH APPELLANTS' OWN PLEADINGS.

Appellants now allege that the transportation of express constitutes an identifiable "line of commerce". They place their entire reliance for the identity of that line of commerce upon the Commission's decision in *Transportation Activities of Arrowhead Freight Lines,* 61 M. C. C. 131, 135 (1952), and a group of cases decided between 1908 and 1932 (Brief for Appellants, p. 32). That reliance is completely misplaced because the decision in *Arrowhead* was reversed in *Arrowhead Freight Lines* v. *United States,* 114 F. Supp. 804 (S. D. Cal. 1953), where the court, after referring to the portion of the Commission's report relied upon by appellants, held

> "All of which seems to tell us that the so-called 'express carrier' finds it impossible to provide better

equipment, and unlawful to provide faster service than motor carriers of 'ordinary freight'; while motor carriers of 'ordinary freight' are permitted to call themselves 'express' carriers and to hold themselves out as providing 'express service at freight rates'.

"By a process of exclusion then, we infer that the only criterion by which the Commission, or the carriers themselves, or any one else, can distinguish 'ordinary freight' motor carriers from an 'express' motor carrier is that the latter is expected to charge a higher rate for the same service." (114 F. Supp. at 813.)

On remand, the Commission laid down five general criteria for defining "express service", *Transportation Activities of Arrowhead Freight Lines,* 63 M. C. C. 573, 581-82 (1955).[21]

[21]"Succinctly stated the rendition of a bona-fide express service by property carriers with authority to transport general commodities requires such carriers (1) to provide a bona fide holding out together with the ability to transport any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both, (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipments which are accepted may require, (3) to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from the point of pickup to the point of delivery, (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public, and, (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay." 63 M. C. C. at 581-82.

More recently, the Commission, citing those five criteria, held,

> "It is true that transportation conditions have changed over the years so as to permit ordinary freight carriers to improve their operation to the point where they are now in a position to provide service substantially equivalent to that of express. Thus, the distinction between the two types of service has been blurred to some extent." *Freight, All Kinds, L. C. L. Container Charges—U. S. A.*, 323 I. C. C. 468, 483 (1964), *sustained sub nom. New Eng. Motor Rate Bureau, Inc.* v. *United States*, 254 F. Supp. 633 (D. Mass.), *aff'd per curiam*, 87 Sup. Ct. 407 (1966).

It is abundantly clear that, whatever may have been the situation prior to 1932, it is no longer possible to draw a clear line of demarcation between "express" and "ordinary freight".[22] Moreover,

> "REA holds itself out to transport all commodities, in any form tendered, covered by its tariff publications, and it has been called upon over the

[22]For example, consider some of the transportation alternatives open to a New York garment manufacturer (some of whom are excellent customers of REA). He can ship his dresses via REA, *i.e.*, as "express"; he can ship them in small lots via parcel post; he can send his dresses in various sized lots to a freight forwarder; he can ship them via certificated motor carrier (with or without pickup at his place of business); he can ship them by air freight; or he can make arrangements with a non-certificated trucker, a "contract" carrier, for delivery. Depending on circumstances, these methods can be very similar in cost and in speed of delivery; yet his parcels of clothing are "express" only if REA carries them. *Cf.*, Petition of Freight Forwarders, R. 46: "We are concerned with what a person does more than with mere nomenclature."

> years to handle merchandise of every description, including items such as foodstuffs, seafood, fresh meats, drugs and medicines, film, legal papers, jewelry and other valuables, live animals, baby chicks, radioactive material, corpses, live blood, eggs, explosives, commodities which are injurious or contaminating to other lading, and commodities requiring special care and protection." *Railway Exp. Agency, Inc., Extension—Nashau, N. H.*, 91 M. C. C. 311, 315 (1962), *sustained sub nom. Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 28 (D. Mass. 1963), *aff'd per curiam*, 376 U. S. 514 (1964).

It is rather difficult for us to visualize Greyhound transporting fresh meats, live animals, baby chicks, radioactive material, corpses, explosives, etc., in the bins under the passenger compartment of its buses. But, according to appellants, REA and Greyhound together control 95% of the "express" market "and all other motor carriers of passengers combined . . . had most of the balance", Appellants' Brief, p. 34. If appellants' construction of the market is correct, why have five railroads, seventeen motor carriers, the national association of freight forwarders, the national association of motor carriers and one of its conferences opposed the present transaction with such vigor?

The answer is to be found in the pleadings below. At that stage, appellants were less sophisticated but more candid with respect to the market in which REA competes. For instance, in the complaint of appellant Freight Forwarders, it is alleged that

> "Intervening plaintiff's members are in direct competition with Railway Express Agency (REA)

and with Greyhound Corporation in the movement of package freight between points in the Continental United States" (R. 329).

Freight Forwarders told the Commission that REA

> "is departing more and more from its traditional role in the general scheme of transportation and is entering the domain of a hauler of general freight in volume lots as distinguished from 'express matter' . . ." (R. 46).

Similarly in the complaint of appellant truck lines, it is contended that

> "Each of said plaintiffs competes over one or more of its authorized routes with Railway Express Agency, . . . and with Greyhound Corporation . . . or corporations controlled by it, in the transportation of property for hire." (R. 332).

The same appellants told the Commission that if REA obtains the needed financing it will be able to "expand the area and intensity of its competition with motor common carriers" (R. 172). Finally, appellants ATA and the Conference also declared in their Petition for Leave to Intervene that their members were in competition with both REA and Greyhound:

> "The Executive Committee of ATA and the Board of Governors of the Conference, composed of motor carriers competitive with Railway Express Agency, Inc. (REA), and the freight operations of The Greyhound Corporation (Greyhound), have reviewed the matter and respectively directed

ATA and the Conference to file this petition and protest" (R. 79).

Thus, from appellants' own pleadings it appears far more likely that REA was correct when it stated before the Commission that it competes with Greyhound only for the business of shipping small packages of such size, weight, volume and character that can be transported on passenger vehicles. Of this business, Greyhound handles substantially less than one percent and REA handles about two percent of the United States total, the remaining ninety-seven-plus being handled by freight forwarders, trucks, railroads and the United States Post Office (R. 186, 191).

It is quite clear that REA does in fact compete with carriers of ordinary freight, freight forwarders and the United States Post Office. Perhaps the broadest competition for REA comes from the freight forwarders, who

> "... aggregate numerous small shipments of individual consignors into consolidated consignments moving in carloads or truckloads. The forwarder holds itself out to the public to provide a through transportation service from point of receipt of the shipment to final destination in its own name and under its responsibility", *Freight Forwarders, Motor Common Carriers, Agreements,* 272 I. C. C. 413, 418 (1948); see also *Motor Rail Co., Determination of Status,* 296 I. C. C. 205, 211-15 (1955).

The functions performed by the freight forwarders are quite similar to those performed by REA:

> "Rail operations of the freight forwarders resemble in many respects the operations of the rail-

> way express companies. The shipments handled by each are composed principally of less-than-carload lots. Each provides a collection and delivery service at many points, and each reserves the right to route shipments." *Freight Forwarding Investigation,* 229 I. C. C. 201, 211 (1938).

In fact, "the mode of transportation employed by forwarders is analogous to that of express companies", *Acme Fast Freight* v. *United States,* 30 F. Supp. 968, 973 (S. D. N. Y.); *aff'd per curiam,* 309 U. S. 638 (1940). As the Commission found as early as 1938, "much traffic has been diverted from the Railway Express Agency, Incorporated, to freight forwarders since the rail carriers expedited their freight-train service", *Freight Forwarding Investigation,* 229 I. C. C. 201, 211 (1938).

The competition faced by REA from the United States Post Office will be intensified as the provisions of P. L. 89-593, 80 Stat. 815 (1966), which gradually increases the maximum size and weight of packages transported by Parcel Post, comes into effect:

> "While estimates vary as to the probable quantity involved, there is no question that the higher maximum limits on parcel post size and weight between first-class post offices will result in substantial diversion of package traffic from private carriers to parcel post. *A large amount of this traffic will be diverted from REA Express.*" Sen. Rep. No. 1534, 89th Cong., 2d Sess., 6-7 (1966) (emphasis added).

Motor carriers are increasing their very large participation in the transportation of small shipments:

Appendix D

"Movement of small-shipment traffic by regulated carriers in 1964 followed trends similar to those noted [for 1963.] . . . Transportation of small shipments by motor carriers increased. . . .

"Revenues for less-than-truckload shipments (those weighing up to 10,000 pounds) by class I motor carriers of general freight amounted to $2.7 billion in 1964 an increase of 8.3 percent over 1963. The number of tons aggregated 69.4 million and the number of shipments carried totaled 247.1 million, an increase of 5.7 and 3.9 percent, respectively, over the previous year. Average weight per shipment rose from 552 to 561 pounds." 79 ICC ANN. REP. 20 (1965).

Since the distinction between express service and regular carriage is "blurred", *Freight, All Kinds, L. C. L. Container Charges—U. S. A.*, 323 I. C. C. 468, 483 (1964), *sustained sub nom., New Eng. Motor Rate Bureau, Inc.* v. *United States*, 254 F. Supp. 633 (D. Mass.), *aff'd per curiam*, 87 Sup. Ct. 407 (1966), there is a large area within which REA and motor carriers are in direct competition. See, *e.g., Men's & Boys' Outerwear—Bruceton, Tenn. to U. S. A.*, 325 I. C. C. 284, 296-97 (1965); *Railway Exp. Agency, Inc., Determination of Status*, 21 M. C. C. 161, 192 (1939).

Enough has been said to demonstrate the speciousness and artificiality of appellants' market definition.[23]

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[23]Technically, if appellants' present definition of the market were correct, the truck lines, freight forwarders, and trucking associations would lack standing to participate in this proceeding since they could not qualify as "persons interested in or affected by the rate, regulation, or practice under consideration" (49 U. S. C. § 42).